

# UNITED STATES INTERNATIONAL TRADE COMMISSION

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In the Matter of: ) Investigation No.:  
CERTAIN COLOR INTRAORAL SCANNERS ) 337-TA-1091  
AND RELATED HARDWARE AND SOFTWARE )

## OPEN SESSIONS

Pages: 633 – 911 (with excerpts)  
Place: Washington, D.C.  
Date: Wednesday, September 19, 2018

ORIGINAL



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Exhibit No.

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1 UNITED STATES OF AMERICA  
2 BEFORE THE  
3 INTERNATIONAL TRADE COMMISSION  
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6 IN THE MATTER OF: : Investigation Number

7 CERTAIN COLOR INTRAORAL SCANNERS : 337-TA-1091

8 AND RELATED HARDWARE AND SOFTWARE :  
9 - - - - - x

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12 HEARING

13 DAY 4

14

15

16 Wednesday, September 19, 2018

17 Courtroom A

18 U.S. International Trade Commission

19 500 E Street SW

20 Washington, DC

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22 The hearing commenced, pursuant to notice of the  
23 Judge, at 9:00 a.m., before the Honorable CLARK CHENEY,  
24 Administrative Law Judge for the United States  
25 International Trade Commission.

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202-347-3700

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- continued -

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1 P R O C E E D I N G S

2 JUDGE CHENEY: Good morning, everyone. Please  
3 take your seats. We're on the record in Investigation  
4 1091. We're in the middle of the evidentiary hearing. We  
5 left off yesterday with the examination of Dr. Stevenson.  
6 Before we resume that examination today --

7 MR. JACOBS: Your Honor, we had concluded the  
8 discussion with Dr. Stevenson. We were talking with  
9 Mr. Bakewell when we left off yesterday on direct.

10 JUDGE CHENEY: Thank you very much for  
11 correcting me. Yes, we did get Mr. Bakewell going. And do  
12 we have any housekeeping matters to talk about before we  
13 resume that testimony today?

14 MR. JACOBS: Not on behalf of Complainant, Your  
15 Honor.

16 MR. SHAW: Nor from Respondents, Your Honor.

17 JUDGE CHENEY: No exhibits need to be moved into  
18 evidence?

19 MR. SHAW: Your Honor, there was a list that was  
20 sent over last night. It was a little late and we're still  
21 reviewing them, so we've agreed to meet and confer at a  
22 break and we'll move them in as soon as we have a chance to  
23 finish our review of the list.

24 JUDGE CHENEY: Anything to add to that, Mr.  
25 Stockstill?

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1 MR. STOCKSTILL: No. Complainants have the list  
2 that they believe should be moved in, and we understand  
3 Respondents are still considering.

4 JUDGE CHENEY: Okay. Thank you for your efforts  
5 to make that as coordinated as possible.

6 So we're ready to go with Mr. Bakewell?

7 Mr. Bakewell, will you please return to the  
8 witness box. As you're making your way up, I'll remind you  
9 that you're still under oath.

10 W. CHRISTOPHER BAKEWELL,  
11 having been previous duly sworn, was examined and testified  
12 as follows:

13 DIRECT EXAMINATION (CONTINUED)

14 BY MS. ONDRICK:

15 Q Welcome back, Mr. Bakewell. If we could put  
16 CDX-9.15 up on the screen, I wanted to take care of one  
17 quick housekeeping item. For the record --

18 MS. ONDRICK: Can we go on the confidential  
19 record? Align confidential.

20 JUDGE CHENEY: This is Align confidential  
21 information. If you're not authorized to view that, please  
22 leave the hearing room.

23 (Confidential session follows.)

24

25



1 OPEN SESSION CONTINUED

2 THE WITNESS: Should I answer the question?

3 JUDGE CHENEY: We're on the public record, and  
4 the pending question is, Can we go to the next slide.

5 A Yes.

6 Q What are you showing here at CDX-9.52?

7 A This summarizes the issues with bond that make  
8 it not possible to do a product comparison in a way that  
9 yields a royalty rate.

10 The companies fundamentally have different  
11 business models even though they compete with one another.  
12 3Shape sells through distributors, whereas Align has a  
13 direct sales model.

14 Diversions, both companies have different  
15 versions of their products.

16 And then Align, as we've heard a lot about,  
17 tries to create value by combining its scanners and  
18 Invisalign system together. 3Shape's business model is  
19 very different in that it seeks to leverage the value of  
20 scanners and doesn't have the same digital ecosystem type  
21 of model that Align does.

22 Q Under what circumstances do you understand a  
23 reasonable royalty approach to be appropriate?

24 A Well, you need reliable data to do a product  
25 comparison. Neither myself nor Respondents' expert,

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1 Mr. Green, have been able to find that sort of product.

2 comparison information.

3 And then you need -- or in the alternative, you  
4 would need some sort of reasonable royalty analysis, and  
5 neither he nor I found the evidence that would permit that  
6 either.

7 Q Did you review any licenses?

8 A There's one license, yes.

9 Q And was that a comparable license?

10 A No. It's different, involves different  
11 technology, and it's a related party intercompany  
12 agreement. That's very different than the situation here.

13 Q Is it your opinion that a bond rate cannot be  
14 readily calculated using a reasonable royalty analysis?

15 A Yes.

16 Q And do you believe that a 100 percent bond is  
17 appropriate?

18 A Well, it would follow up. Ultimately, it's up  
19 to the Commission to make that determination. But as I  
20 understand the way the process works, it would follow that  
21 that's the decision that will be made, as I understand the  
22 process.

23 Q Okay. And if we could go to CDX-9.53.

24 And so this is the list of exhibits that we just  
25 called out and counsel objected to that basically summarize

1 the groupings and the financial analysis and data that you  
2 analyzed in this case, correct?

3 A Yes.

4 Q And if we could go to CDX-9.4, what does this  
5 slide show?

6 A This provides a summary of the exhibits that  
7 were referenced in the slides that we discussed earlier and  
8 in my analyses.

9 Q And have we covered all your opinions in this  
10 case?

11 A I believe so, yes.

12 MS. ONDRICK: I pass the witness.

13 JUDGE CHENEY: Is there cross-examination for  
14 Mr. Bakewell?

15 MR. GANGULY: Yes, Your Honor, there is.

16 Can we go to CDX-9.18, please.

17 And, Your Honor, we would request to go on the  
18 confidential record. This is Align confidential financial  
19 information.

20 JUDGE CHENEY: Okay.

21 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: That's all the questions I have.  
3 Might make sense to take our break for the morning. Will  
4 there be redirect?

5 MS. ONDRICK: There is.

6 JUDGE CHENEY: I'll remind you during the break  
7 not to discuss your testimony with anyone. We will resume  
8 at 10:57. We're off the record.

9 (Recess from 10:43 a.m. until 10:58 a.m.)

10 JUDGE CHENEY: We're back on the record in  
11 Investigation -- back on the public record in Investigation  
12 337-TA-1091, Certain Color Intraoral Scanners and Related  
13 Hardware and Software.

14 Before the break I had asked Mr. Bakewell some  
15 questions, and now I think we're going to have some  
16 redirect by Align.

17 REDIRECT EXAMINATION

18 BY MS. ONDRICK:

19 Q Mr. Bakewell, as to segment reporting or  
20 activities-based costing, which better captures how  
21 companies allocate their resources between products?

22 A I think they're both valid. I think that for  
23 this exercise, the activities-based costing types of  
24 analyses are maybe a little more insightful. But I think  
25 they both provide insight into the business and how it's

1 run.

2 Q And why do you say the activities-based costing  
3 is better?

4 A Because --

5 Q Or more insightful, I should say.

6 A Well, it's additional work beyond what's in the  
7 financial statements, and we're getting more insight into  
8 the business by talking to managers about what they do and  
9 what the numbers mean and how value is created. We're  
10 asking questions in that exercise that relate to specific  
11 investments, which I think is what the ITC ultimately wants  
12 to know is what the drivers are behind those specific  
13 investments. And you don't have that level of granularity  
14 in the financial statements and in financial accounting.  
15 So it just provides more -- kind of a deeper dive into the  
16 numbers and provides additional context.

17 Q Counsel asked you some questions about some of  
18 your comparison slides showing further significance, and  
19 counsel asked you if those slides showed both DI products.

20 Do you recall that?

21 A Yes.

22 Q Did you do comparisons for each DI product as  
23 well?

24 A Yes, I did.

25 Q And were those at slides 47 and 48, if we could

1 put those up?

2 JUDGE CHENEY: We're on the public record.

3 MS. ONDRICK: Can we please go on the

4 confidential record. Thank you, Your Honor.

5 JUDGE CHENEY: This is Align confidential

6 information?

7 MS. ONDRICK: Yes.

8 (Confidential session follows.)

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1 OPEN SESSION CONTINUED .

2 JUDGE CHENEY: Back on the public record.

3 BY MS. ONDRICK:

4 Q Counsel also showed you Align's 10-K, and there  
5 were two facilities there that weren't called out in one of  
6 your slides. Do you recall identifying that?

7 A Yes.

8 Q Why were those two facilities in Amsterdam and  
9 China not shown?

10 A Those are a little bit different. They  
11 certainly exist, but those facilities are more oriented, as  
12 I understand it, towards serving local markets, and are  
13 less comparable. And I also have less information about  
14 those. So the comparisons I didn't think were particularly  
15 meaningful because of the differences, and then also the  
16 lack of information. So there's two reasons.

17 Q Okay.

18 MS. ONDRICK: And then, Your Honor, we also did  
19 not identify one exhibit on the exhibit march-through we  
20 had.

21 Q So CX-1360, which is the TechNavio report. Did  
22 you consider that in forming your opinions in this case?

23 A Yes.

24 MS. ONDRICK: No further questions.

25 JUDGE CHENEY: Any other questions for this

1 witness before he is released?

2 MR. GANGULY: No, Your Honor.

3 JUDGE CHENEY: Okay.

4 Thank you, Mr. Bakewell. I appreciate your  
5 testimony. You may be excused.

6 THE WITNESS: Thank you.

7 (Witness excused.)

8 JUDGE CHENEY: My understanding is that now  
9 we're going to turn to the presentation of Respondents'  
10 witnesses. Is that right?

11 MR. JACOBS: That's our understanding, Your  
12 Honor.

13 JUDGE CHENEY: Respondents, please call your  
14 first witness.

15 MR. SHAW: So, Your Honor, just for your  
16 information, we have met and conferred with the  
17 Complainants and we have made a slight change to the order  
18 of presentation of Respondents' fact witnesses. If you'd  
19 like me to, I'll let you know what that's going to be.

20 JUDGE CHENEY: Is there an updated sheet that I  
21 should be looking at?

22 MR. SHAW: We just agreed on this this morning,  
23 Your Honor, so the sheet has not been updated yet, but I  
24 can tell you the order.

25 JUDGE CHENEY: Okay.



1 MR. SHAW: So our first witness is going to be  
2 Dr. Rune Fisker, second is going to be Christoffer  
3 Melchior, third is going to be Kristian Hansen, fourth is  
4 going to be Alan Hyldal, and fifth is going to be Dr. Mike  
5 van der Poel. The parties have agreed that Mr. Tais  
6 Clausen is currently going to be moved to Friday, and we  
7 are still meeting and conferring about whether we are going  
8 to call him or not.

9 JUDGE CHENEY: Okay.

10 MR. SHAW: So Respondents call Dr. Rune Fisker.

11 JUDGE CHENEY: Please raise your right hand and  
12 I'll swear you in.

13 (Oath administered.)

14 JUDGE CHENEY: Please take a seat.

15 Mr. Shaw, proceed when you're ready.

16 RUNE FISKER,  
17 having been first duly sworn, was examined and testified as  
18 follows:

19 DIRECT EXAMINATION

20 BY MR. SHAW:

21 Q Please state your name.

22 A Rune Fisker.

23 Q Who is your current employer, Dr. Fisker?

24 A 3Shape A/S.

25 Q Can you please briefly describe your educational

1 background?

2 A I have a master and a Ph.D. in computer science  
3 from Technical University of Denmark, and I also have an  
4 executive MBA from Copenhagen Business School.

5 Q And how long have you worked for 3Shape?

6 A Since 2000. I was the first employee.

7 Q And what is your current title?

8 A VP of product strategy.

9 Q Are you responsible for any of 3Shape's business  
10 units currently?

11 A Yes.

12 Q Which ones?

13 A I'm responsible for the restorative lab business  
14 unit and for the TRIOS restorative clinic business unit.

15 Q When did 3Shape start thinking about entering  
16 the dental industry?

17 A It was right from the start, around 2000.

18 Q When did 3Shape start development of your first  
19 dental product?

20 A Around 2003.

21 Q Which product was that?

22 A This was a dental labs desktop scanner.

23 Q What is a dental lab desktop scanner?

24 A You basically have a scanner on the desktop, and  
25 you scan the gypsum model or impressions of the patient's

1 teeth.

2 Q And does 3Shape still sell lab scanners?

3 A Yes.

4 Q How does a lab scanner compare to a TRIOS  
5 scanner?

6 A The lab scanner basically scans gypsum models or  
7 impressions of the patient teeth, where the TRIOS scanner  
8 scans directly in the mouth, intraorally.

9 Q Is there any software associated with 3Shape's  
10 lab scanners?

11 A Yes.

12 Q What is that?

13 A This is called 3Shape Dental System.

14 Q Can you describe 3Shape Dental System briefly?

15 A Yeah, it's a CAD/CAM software where you can  
16 design restorative indications like crowns, bridges,  
17 inlays, onlays, veneers, et cetera.

18 Q Did you look at any competitor's products in  
19 designing your dental lab scanners?

20 A Yes, we always look at competitor product to  
21 make a better and more competitive and superior product.

22 Q And you mentioned before restorative dentistry.  
23 Does restorative dentistry involve moving patients' teeth?

24 A No.

25 Q Does Dental System software move patients'

1 teeth?

2 A No.

3 Q Does 3Shape have any software for orthodontics?

4 A Yes.

5 MR. JACOBS: Objection, leading, Your Honor.

6 JUDGE CHENEY: Overruled.

7 Q What is that orthodontic software called?

8 A This is called 3Shape Ortho System.

9 Q Can a customer purchase Dental System without

10 also purchasing Ortho System?

11 A Yes. This is the typical case.

12 Q And if a customer wanted both Dental System and

13 Ortho System, is that an option?

14 A Yes. They can buy this as a bundle.

15 Q When a customer purchases that Dental System and

16 Ortho System bundle, do the two software systems act as one

17 product?

18 A No, they remain independent.

19 Q Can you please turn in your witness binder there

20 to Exhibit JX-225C.

21 A Yes.

22 Q Do you recognize this document?

23 A Yes.

24 Q What is it?

25 A This is the 3Shape Dental System 2017 user

1 manual.

2 Q Can you please turn to the Bates page

3 3Shape\_ITC\_6317.

4 A Yes.

5 Q And on that page begins a table of indications.

6 Can you describe what are indications?

7 A So indications are the different treatments you

8 can use -- yeah, you can design with the Dental System.

9 Q And if you turn to Bates page 6318, one of the  
10 indications is labeled Orthodontics/Orthodontic Appliances.

11 Do you know what that refers to?

12 A Yes. This refer to the Ortho System appliances  
13 interface.

14 Q And in that case, the Ortho System appliances is  
15 referred to -- or the Ortho System software, I'm sorry, is  
16 referred to as an add-on. Can you describe what "add-on"  
17 means in this case?

18 A Yeah, so you have the basic Dental System  
19 packet, software packets, and then you have add-ons where  
20 you can do additional designs.

21 Q Is there more than one type of add-on to Dental  
22 System?

23 A Yeah. There are two types of add-ons, there are  
24 the add-ons that is built in with the Dental System and  
25 then the add-ons that are independent software packages.

1 Q And what is the difference between the built-in  
2 add-ons and separate add-ons?

3 A This is basically that it's a separate -- yeah,  
4 that you can -- that you build in as a part of the software  
5 when they are in the -- they build in add-ons, and then you  
6 have the, again, the separate software packages that are  
7 completely independent software packages.

8 Q Which separate software packages are independent  
9 of Dental System but listed as add-ons there?

10 A It is the Ortho System and the Implant Studio.

11 Q Why do you call both the built-in add-ons and  
12 the separate package add-ons in the manual?

13 A To make it easier to communicate to the  
14 customer, the end user.

15 Q Does Dental System interface with 3Shape's Ortho  
16 Analyzer software?

17 A No.

18 Q Can Dental System invoke any orthodontic  
19 workflows?

20 A Yes. It can launch the Splint Designer.

21 Q Does Dental System invoke any other orthodontic  
22 workflows?

23 A No.

24 Q Can you briefly describe the Splint Designer?

25 A Yes. So Splint Designer is a CAD software for

1 designing dental splints. A splint is a small appliance, a  
2 small device that you put between the teeth.

3 MR. SHAW: Your Honor, we're going to need to go  
4 on the 3Shape confidential record just to discuss a couple  
5 software specifications quickly.

6 JUDGE CHENEY: Is it at such a low level that  
7 people that use 3Shape software wouldn't know it?

8 MR. SHAW: The people who use the software would  
9 know it, Your Honor, yes.

10 JUDGE CHENEY: Aren't they members of the  
11 public?

12 MR. SHAW: Your Honor, can I confer with my  
13 client for a second?

14 JUDGE CHENEY: Sure.

15 MR. SHAW: Thank you.

16 We can stay on the public record, Your Honor.

17 JUDGE CHENEY: Great. Thanks.

18 Q Can you please turn, Dr. Fisker, in your binder  
19 to JX-223C.

20 A Yes.

21 Q Do you recognize this document?

22 A Yes. This is the software specification for  
23 Dental System 2017.

24 Q Can you please turn to the Bates page 9379.

25 A Yes.



1 . Q And there's a box near the center of the page in  
2 the third row labeled Orthodontics Interface. Do you  
3 understand what orthodontics interface means in this  
4 context?

5 A Yes. This is the Splint Designer.

6 Q And on that same page in JX-223C, the  
7 Orthodontics Interface box mentions something called  
8 SS0016. Do you understand what that is?

9 A Yes.

10 Q What is it?

11 A This is the software specification for that  
12 particular orthodontic interface.

13 Q Can you please turn in your witness binder to  
14 JX-226C. Do you recognize this document, Dr. Fisker?

15 A Yes.

16 Q What is it?

17 A This is, again, the software specification for  
18 the orthodontic interface we saw on the previous page.

19 Q And does Exhibit JX-226C indicate anything about  
20 the scope of the orthodontics interface in Dental System?

21 A Yes. If you go a little bit on the lower part  
22 of the page, something called orthodontic order creation  
23 S2, and I'm just going to read it. The user must be able  
24 to select the following orthodontic types for the order in  
25 the order form module. And then it lists the types and it

1 says, only splints.

2 Q Is there anything else in JX-226C regarding the  
3 scope of the orthodontics interface in Dental System?

4 A Yes. If you turn the page.

5 Q What does that indicate to you, sir?

6 A If you look again at S2.1, you can say it's  
7 create an order with a splint indication. And again, it  
8 shows that it can only do splints.

9 Q Under that verification protocol, are there any  
10 other orthodontic indications tested besides splints?

11 A No.

12 Q Do you know why no other orthodontic indications  
13 are tested?

14 A Because there are no other orthodontic  
15 indications accessible from Dental System.

16 Q You mentioned that you're responsible for the  
17 TRIOS business unit. Do you recall that?

18 A Yes.

19 Q Did you have any role in the development of  
20 TRIOS?

21 A I was managing the development.

22 Q And what year did that development first start?

23 A 2007, 2008.

24 Q And at the start of TRIOS development, were any  
25 other 3Shape employees involved?

1 A Yes. Engineer called Carsten Nielsen.  
2 Q At some point in time did that change?  
3 A Yes. We hired Mike van der Poel.  
4 Q When was that?  
5 A In early 2009.  
6 Q How was the TRIOS development project going  
7 before Dr. Van der Poel joined 3Shape?  
8 A Very slow.  
9 Q How did the project go after you hired Dr. Van  
10 der Poel?  
11 A. It really picked up.  
12 Q Why was that?  
13 A Because Mike has a very strong background in  
14 optics, so he has a Ph.D. and was also an associate  
15 professor in optics.  
16 Q Did any 3Shape, Inc. employees provide any input  
17 to TRIOS technical development?  
18 A No.  
19 Q Did any former Cadent or Align employees provide  
20 any input to TRIOS technical development?  
21 A No.  
22 Q Did 3Shape copy any Cadent patents in developing  
23 its TRIOS scanner?  
24 A No.  
25 Q Did 3Shape copy iTero in developing its TRIOS

1 scanner?

2 A No.

3 Q Did 3Shape review any competitor products during  
4 development of TRIOS?

5 A Yes. We always review products. So we  
6 reviewed -- were reviewing the market leader, which was  
7 Sirona CEREC. We reviewed the 3M scanner, known as Brontes  
8 at that time. We reviewed the E40.

9 (Reporter interruption.)

10 A So we reviewed the CEREC system, which was the  
11 market leader at that time. We reviewed the 3M scanner  
12 known as Brontes at that time. We reviewed the E40  
13 scanner. We reviewed also, of course, the iTero and  
14 several other products like ImageT [ph] and so on.

15 Q Why did you review those competitive products?

16 A Because we believe it's very important product  
17 management to review competitors, to build superior and  
18 better products.

19 Q When was the optical design of TRIOS decided  
20 upon?

21 A Summer 2009.

22 Q How do you recall that?

23 A Because it was a very important milestone and  
24 was shortly after Mike started.

25 Q Did 3Shape ever purchase or obtain a

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1 competitors' intraoral scanner before the optical design of  
2 TRIOS was decided upon?

3 A No.

4 Q Subsequent to that, have you ever opened up any  
5 competitive scanners?

6 A Yes.

7 Q And before the TRIOS optical design was decided  
8 upon --

9 A No.

10 Q -- did you open up any competitive scanners?

11 A Not before the design was decided on.

12 Q And after the design was decided upon, which  
13 competitive scanners did you open up?

14 A iTero and CEREC, Sirona CEREC.

15 Q I'd like to talk specifically about opening up  
16 the iTero. How many times have you been involved in  
17 opening up an iTero scanner?

18 A One time.

19 Q And when and where did that occur?

20 A This was in 2010, summer 2010, at Cordent in  
21 Holland.

22 Q What is Cordent?

23 A Cordent is our 3Shape re-seller in Holland.

24 Q What did you do specifically during the review  
25 of iTero at Cordent?

1           A       We were scanning ourselves initially, and then  
2 we opened up the handheld and the Cart.

3           Q       Did you open up the handheld far enough to see  
4 the details of the optical system?

5           A       No.

6           Q       And why couldn't you open up the iTero far  
7 enough to review the optical system?

8           A       Because it should be fully functional  
9 afterwards. Cordent was using it on a daily basis.

10          Q       And at the end of your inspection, were you, in  
11 fact, able to put the iTero back together so that it was  
12 functional?

13          A       Yes.

14          Q       Are you familiar with 3Shape's R&D and product  
15 development efforts for TRIOS?

16          A       Yes.

17          Q       Can you describe the TRIOS product release  
18 timeline that resulted from 3Shape's R&D efforts?

19          A       Yeah. So we have launched the TRIOS color in  
20 2013. We launched the TRIOS 3 in 2015. We launched the  
21 first TRIOS wireless control scanner in the world in 2015.  
22 Sorry, in 2017. We also launched a new cart called the  
23 Move in 2018. And we also innovated what we call the part  
24 where you can work with a laptop already in 2013.

25          Q       Do you know whether TRIOS has won any industry

1 awards?

2 A We have won many awards.

3 Q Can you describe a couple of the more important  
4 awards?

5 A Yes, I believe it's called the Cellerant award,  
6 was best technology award which we have won five times in a  
7 row. We have also won the Red Dot award for extraordinary  
8 design and usability in 2018.

9 Q Switching gears a little bit, have you ever  
10 personally discussed patents with anyone from Cadent or  
11 Align?

12 A Yes.

13 Q And who was that with?

14 A Avi Kopelman.

15 Q And when and where did that conversation occur?

16 A This was in Canada, October 2015.

17 Q Can you briefly describe the conversation?

18 A Yeah. So we had been presenting, both of us,  
19 and then we were discussing in a group afterwards, and Avi  
20 was saying that we were violating -- TRIOS was violating  
21 the iTero patents.

22 Q And are you aware that an interface between  
23 TRIOS and Invisalign opened in 2016?

24 A Yes.

25 Q Pursuant to that integration, could Align track



1 which scanned files came from a TRIOS scanner?

2 A Yes, they could both see it came from the 3Shape  
3 cloud and there's a tag in the actual STL file.

4 (Reporter interruption.)

5 A There's a tag, a small tag saying 3Shape in the  
6 STL file, which is the scan file. And there was also the  
7 cloud. So you could see when it comes into the cloud, from  
8 the 3Shape cloud into the Align cloud.

9 Q Did you follow whether or not the  
10 TRIOS/Invisalign interface was successful?

11 A Yes.

12 Q And how did you do that?

13 A We got the regular update in management.

14 Q And what was your perception of the  
15 TRIOS/Invisalign integration?

16 A It was very successful.

17 Q And during that integration, did you personally  
18 ever think Align would sue 3Shape for patent infringement?

19 A No.

20 Q Are you aware that after filing this case, Align  
21 announced termination of the TRIOS/Invisalign interface?

22 A Yes.

23 Q Prior to that announcement, did 3Shape  
24 management ever discuss the possibility of Align closing  
25 the interface?

1 A Yes.

2 Q Why would you discuss that?

3 A Because I believe it's very good management that  
4 you consider for different scenarios both positive and  
5 negative.

6 Q Prior to the termination announcement of the  
7 TRIOS/Invisalign interface, did you personally think that  
8 Align would close that interface?

9 A No.

10 Q Can you please turn in your witness binder to  
11 JX-204C. And do you see on page 1 there's an e-mail from  
12 Alan Hyldal that starts in the middle of the page?

13 A Yes.

14 Q Can you please describe the context of that  
15 e-mail?

16 A Yes. This was one of the status updates we got,  
17 and we were so successful with this that we were predicting  
18 that 15 percent of all Align cases would come from TRIOS by  
19 end of 2017.

20 Q And you respond at the top of the first page by  
21 e-mail, and you say, really impressive, and it makes close  
22 to impossible for Align to close us down.

23 What did you mean by that?

24 A With such a large number of customers, I could  
25 not imagine that Align would treat their own customers so

1 bad and shut down that interface.

2 MR. SHAW: Pass the witness, Your Honor.

3 JUDGE CHENEY: Okay. Any cross-examination of  
4 Mr. Fisker?

5 MR. JACOBS: Yes, Your Honor.

6 JUDGE CHENEY: Please proceed.

7 MR. JACOBS: Thank you very much, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. JACOBS:

10 Q Good morning, Dr. Fisker. It's good to see you  
11 again.

12 A Good morning.

13 Q I want to start out with something you said at  
14 the beginning of your testimony. You said that 2009 was  
15 somewhat of an inflexion point at 3Shape when Dr. Van der  
16 Poel was hired; is that correct?

17 A Yes.

18 Q So if Dr. Van der Poel tells us something about  
19 the operation or the functionality of the TRIOS, we should  
20 take his word at that, correct?

21 A Yes.

22 Q Okay. Now, 3Shape was aware of Cadent patents  
23 in 2007.

24 That's true, isn't it, sir?

25 A Yes.

1 Q And you can agree that that was fairly early in  
2 the development process of the TRIOS, right?

3 A Yes.

4 Q And there were internal discussions at 3Shape  
5 where significant concerns were raised about Cadent  
6 patents.

7 Fair enough?

8 A Yes, we did a lot of freedom-to-operate  
9 analysis.

10 Q True.

11 No lawyers were involved in that, right?

12 Correct, sir?

13 A Patent agents, internal patent agents.

14 Q Thank you, sir.

15 So 3Shape engineers, including yourself, did a  
16 search, and you identified what would be described as key  
17 Cadent patents.

18 That's true, isn't it?

19 A Yes.

20 Q And 3Shape engineers discussed these key Cadent  
21 patents internally, true?

22 A Yes.

23 Q So it's fair to say that 3Shape as a company  
24 wants to avoid infringing patents, correct?

25 A We don't want to -- yes. We don't want to

1     infringe patents.

2           Q     But you understand at the same time that a  
3     company can still infringe a patent even if it wants to  
4     avoid infringing a patent?

5                     You understand that, right?

6           A     Yes.

7           Q     So if you could, Dr. Fisker, I'm going to ask  
8     you to turn to JX-0235C. You should have a binder from us  
9     as well, and I'm going to pull this up.

10                    JUDGE CHENEY: I don't think binders have been  
11     distributed for your cross.

12                    And I just don't know how we would cross-examine  
13     without a binder.

14                    MR. JACOBS: I agree, Your Honor.

15                    THE WITNESS: Would you repeat the number?

16                    MR. JACOBS: Yes. Thank you, Dr. Fisker. It's  
17     JX-0235C.

18                    MR. SHAW: Your Honor, this is a confidential  
19     3Shape business document.

20                    MR. JACOBS: Your Honor, this is a -- actually,  
21     it's a study of competitive scanners in the marketplace.  
22     There's absolutely nothing in it that would be  
23     confidential. I believe they even discussed this during  
24     the direct examination of Dr. Fisker.

25                    JUDGE CHENEY: Any response, Mr. Shaw?

1 MR. SHAW: We didn't discuss this document, Your  
2 Honor, and the document is, like I said, a confidential  
3 internal business document.

4 JUDGE CHENEY: Who prepared the document?

5 MR. JACOBS: Document was prepared by engineers  
6 within 3Shape doing competitive analysis of scanners on the  
7 marketplace, Your Honor.

8 JUDGE CHENEY: We'll go on the confidential  
9 record.

10 MR. SHAW: Thank you, Your Honor.

11 (Confidential session follows.)  
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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: Any redirect for the witness?

3 (Reporter interruption.)

4 JUDGE CHENEY: Can we go on the public record or  
5 is it going to be more about internal deliberations about  
6 patent strategy and competitive development?

7 MR. SHAW: Yes, Your Honor, I'm going to dive  
8 right into that.

9 And, actually, Your Honor, I have a redirect  
10 binder if our paralegal may approach one more time.

11 JUDGE CHENEY: We'll stay on the confidential  
12 record. But surely --

13 MR. JACOBS: Were these disclosed to us pursuant  
14 to the agreement to disclose documents relating to  
15 the direct -- I don't believe they were, Your Honor.

16 MR. SHAW: Your Honor, I wasn't planning to go  
17 into these documents, but I believe the cross-examination  
18 opened the door.

19 MR. JACOBS: Your Honor, we had an agreement in  
20 place that anything used on direct in any way would be  
21 provided ahead of time so you could properly prepare. This  
22 is completely inappropriate, violates our agreement.

23 JUDGE CHENEY: Okay. Well, was I a part of the  
24 agreement?

25 MR. SHAW: No, you weren't, Your Honor.

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1 MR. JACOBS: We made the agreement -- we brought.  
2 it to your attention, it was two days before at 7:00, any  
3 documents or exhibits that you're going to use with a  
4 witness on direct, you have to disclose, and I believe we  
5 made Your Honor aware of it in some type of document, and  
6 certainly I mentioned it during the prehearing conference.  
7 We've relied upon this agreement. There are 15 documents  
8 that have never been provided before this direct, Your  
9 Honor.

10 JUDGE CHENEY: So in your agreement, Mr. Jacobs,  
11 did you agree to provide documents that would be used on  
12 cross-examination?

13 MR. JACOBS: No, just direct demonstratives and  
14 exhibits that would be used in any way as part of a direct,  
15 Your Honor.

16 JUDGE CHENEY: So you could surprise the witness  
17 with -- and the witness's counsel with things on  
18 cross-examination, but it's your position that the  
19 witness's counsel should not be able to rehabilitate those  
20 things that they did not have knowledge of beforehand?

21 MR. JACOBS: In my 30 years of trying cases,  
22 including at the Department of Justice, it's always been  
23 that way, Your Honor. You can cross-exam with anything so  
24 you don't have to look at it. For example, I haven't had  
25 an opportunity to look at these documents to determine

1 whether I have objections to them. That is the basis of  
2 the agreement with regard to exchanging documents for  
3 direct examination. No surprises. Am I going to object to  
4 what he's going to show the witness? Cross-exam, Your  
5 Honor, because you can really go anywhere with a  
6 cross-exam, we never agree to provide cross-exam documents  
7 before a cross-examination in any case I've ever been  
8 involved with.

9 JUDGE CHENEY: How does this relate to your  
10 agreement that there's nothing that's beyond the scope? So  
11 if -- how does that relate?

12 MR. JACOBS: I can explain that. You can go  
13 beyond the scope, Your Honor, as long as -- if you're on  
14 direct examination in any way you're providing that at 7  
15 p.m. two nights before so that the parties can meet and  
16 confer if there are any concerns whatsoever in the  
17 documents that one intends to use. So as long as they  
18 would have provided these document pursuant to our  
19 agreement and we could have examined them and had a meet  
20 and confer, raising objections with Your Honor, that would  
21 be okay. What you can't do is you can't bring 15 new  
22 documents in for a redirect when you haven't provided them  
23 and you have an agreement that says anything that will be  
24 used in any capacity on direct will be exchanged two nights  
25 before 7 p.m., Your Honor.

1 JUDGE CHENEY: Your response, Mr. Shaw?

2 MR. SHAW: Your Honor, this is not direct, this  
3 is redirect. He opened the door by trying to intimate with  
4 the witness that there was some copying of Cadent's  
5 patents, and under Federal Rule of Evidence 106 is a  
6 similar completeness rule to what we've discussed before.  
7 I'm entitled to introduce any other writing or recorded  
8 statement that in fairness ought to be considered at the  
9 time if he introduces part of a writing or recorded  
10 statement.

11 And, Your Honor, we think this completes the  
12 picture as to 3Shape's analysis of the Cadent patents.  
13 He's trying to present only part of the story to intimate  
14 some kind of copying.

15 JUDGE CHENEY: Well, I don't understand if  
16 you're introducing an additional part of the written record  
17 that was presented to the witness during direct why we have  
18 15 additional exhibit numbers.

19 MR. SHAW: Because that's further communications  
20 in the same analysis that he was -- that he went part of  
21 the way down the road towards.

22 JUDGE CHENEY: So they're in the same e-mail  
23 chains, part of the same document?

24 MR. SHAW: I do not believe they are in the  
25 exact same e-mail chain, Your Honor, but it's among the

1 same people doing the same analysis of the same patents.

2 JUDGE CHENEY: Okay. We're going to take a  
3 two-minute recess.

4 (Brief recess.)

5 JUDGE CHENEY: Please take your seats. Let's go  
6 back on the record. I want to hear from Mr. Shaw. First  
7 of all, I want to see the binder, that's got the 15  
8 exhibits.

9 Mr. Shaw, was there a date by which exhibits to  
10 be used at the hearing were disclosed to the other side,  
11 the procedural schedule?

12 MR. SHAW: Yes, Your Honor.

13 JUDGE CHENEY: Was that date May 11th?

14 MR. SHAW: I believe that's correct, Your Honor.

15 JUDGE CHENEY: Were these 15 exhibits on that  
16 list?

17 MR. SHAW: They were not, Your Honor. They were  
18 produced afterwards pursuant to Judge Lord's compelling  
19 order in the 1090 investigation.

20 JUDGE CHENEY: And not produced pursuant to any  
21 order that I gave allowing discovery after the close of  
22 discovery.

23 MR. SHAW: That's correct, Your Honor, but we do  
24 have a cross-use agreement, if I may.

25 JUDGE CHENEY: Yeah. They're not going to come

1 in.

2 MR. SHAW: Does that include the ones that  
3 counsel showed on cross, Your Honor, that were from that  
4 same production on Monday?

5 JUDGE CHENEY: Did they produce them on the list  
6 that was disclosed on May 11th?

7 MR. SHAW: They did not, Your Honor.

8 JUDGE CHENEY: Let me consult one more time.  
9 Brief recess.

10 (Brief recess.)

11 JUDGE CHENEY: Please take your seats. We can  
12 go back on the public record.

13 My, what a pickle we find ourselves in. I'm  
14 really disappointed, I'll just say that.

15 So no documents from the examination of this  
16 witness have been admitted into the record. We will go  
17 through that tomorrow. I'm not going to admit anything  
18 that didn't follow my order about when exhibits would be  
19 disclosed.

20 So with that, you can continue your examination,  
21 Mr. Shaw.

22 MR. SHAW: Thank you, Your Honor.

23 BY MR. SHAW:

24 Q Dr. Fisker, can you turn back to JX-235C in  
25 Mr. Jacob's binder, the cross binder?

1 (Reporter interruption.)

2 JUDGE CHENEY: I would like my opening to be on  
3 public record. And are we going to continue that, Counsel?

4 MR. SHAW: We need to be on the confidential  
5 record, Your Honor.

6 (A discussion was held off the record.)

7 JUDGE CHENEY: Just in case it helps counsel, I  
8 have orders in the case about when you're supposed to do  
9 things. Your side agreements don't change my orders. That  
10 was one of the points of one of the motions in limine or an  
11 order that came out shortly before that. If you want  
12 relief from what you're required to do under my orders, you  
13 have to ask for it. And you have to get a ruling from me  
14 on it. Your cross-use agreements are whatever you think  
15 they are, but they don't contravene my orders.

16 Okay. Let's continue now. Mr. Shaw would like  
17 to be on the 3Shape confidential record.

18 MR. SHAW: Yes, sir.

19 JUDGE CHENEY: And we'll proceed on that basis.

20 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: So we're on the public record,  
3 and the next witness called is Christopher Melchior for  
4 Respondents.

5 Mr. Melchior, please raise your right hand and I  
6 will swear you in.

7 (Oath administered.)

8 JUDGE CHENEY: Please be seated. I believe  
9 Mr. Shaw has come questions for you.

10 CHRISTOFFER MELCHIOR,  
11 having been first duly sworn, was examined and testified as  
12 follows:

13 DIRECT EXAMINATION

14 BY MR. SHAW:

15 Q Can you please state your full name?

16 A Christoffer Melchior.

17 Q Who is your current employer?

18 A 3Shape A/S.

19 Q What is your title at 3Shape A/S?

20 A I am a VP of global sales and customer care.

21 Q How long have you worked for 3Shape A/S?

22 A Since August 2016.

23 Q Are you familiar with the process by which  
24 3Shape sells its products?

25 A Yes.

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1 Q Can you please generally describe 3Shape's sales  
2 process in the United States?

3 A Yes. So at 3Shape, we have a number of  
4 resellers in the U.S. So 3Shape sells our products to  
5 resellers, and these resellers sell the products to end  
6 users. They can be dental laboratories or dental clinics.

7 Q Who does 3Shape consider to be its customers  
8 generally?

9 A The resellers.

10 Q What are your current job responsibilities as VP  
11 of global sales?

12 A My current job responsibility involves  
13 establishing the priorities for the country organizations  
14 and also defining the responsibilities of the country  
15 organizations vis-à-vis the headquarters.

16 Q What are your current responsibilities as VP of  
17 customer care?

18 A So 3Shape does after-sales support on our  
19 products. So if the reseller cannot solve a technical  
20 issue for an end user, the reseller will hand over that  
21 case to 3Shape who will then try and troubleshoot the case.

22 Q Are you responsible for any other departments at  
23 3Shape?

24 A I'm also responsible for -- I apologize for  
25 that. I'm responsible for the global academy. So we just

1 separate out the global academy from customer care.

2 Q What is the global academy?

3 A The global academy is our training organization  
4 where we train predominantly resellers in the use of our  
5 products, and also train our own internal staff, and to a  
6 lesser degree also train some end users.

7 Q You mentioned country organizations before. Are  
8 you familiar with which 3Shape entity is the country  
9 organization for the United States?

10 A Yes.

11 Q Which one is that?

12 A So 3Shape, Inc.

13 Q Are you familiar with the role and  
14 responsibilities of 3Shape, Inc.?

15 A Yes.

16 Q And how are you familiar with that?

17 A So 3Shape, Inc., reports to me. So together  
18 with the general manager of 3Shape, Inc., I have designed  
19 the organization and agreed on what the roles and  
20 responsibilities is of the different parts of the  
21 organization. I was also earlier this year for a two-month  
22 period interim general manager for North America or for the  
23 U.S., because the general manager that we had previously  
24 got another job opportunity.

25 Q Can you describe how the departments of 3Shape,

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1 Inc., are organized?

2 A Yes. So we have a commercial organization with  
3 three business managers that are regionally based. Then we  
4 have a marketing department that's based in New Jersey. We  
5 have a business development organization that's also  
6 predominantly based in New Jersey. Then we have an academy  
7 team and we also have a number of account managers who  
8 manages the relationships with our resellers.

9 Q What does the commercial organization of 3Shape,  
10 Inc., do?

11 A So we have three regional managers that each has  
12 about ten people each who are responsible for supporting  
13 the resellers at the local level. So presenting 3Shape  
14 products to the resellers, training them on how 3Shape  
15 products works with the resellers. And also on occasions,  
16 they will be together with the resellers supporting them  
17 when they make visits to dentists or dental laboratories.

18 Q What does the marketing organization of 3Shape,  
19 Inc., do?

20 A Two things. So mainly they will be supporting  
21 the resellers with marketing materials and marketing  
22 campaigns that the resellers can use to promote the  
23 product. And also to some degree, we do certain events  
24 like industry congresses where 3Shape will be present at  
25 these events.

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1 Q What does the business development organization  
2 of 3Shape, Inc., do?

3 A So the business development team is -- I believe  
4 it's broken into three smaller functions. One is we have a  
5 business development manager who looks at the implant  
6 segment of the market and also the resellers we have in  
7 that segment. Then we have a lab, dental laboratory  
8 business where the business manager looks after the  
9 resellers within the dental laboratory area. And also  
10 we'll attend the different events. And we have a special  
11 markets team that looks after large corporate accounts. So  
12 that could be universities, it could be dental service  
13 organizations and so on.

14 Q And can you provide a few examples of the larger  
15 dental service organizations in the U.S.?

16 A Yeah. So there's Heartland Dental, I believe  
17 they're called, and Aspen Dental, Pacific Dental, Western  
18 Dental. So there's a large number of different corporate  
19 accounts.

20 Q What does the account management department at  
21 3Shape, Inc., do?

22 A So the account management does -- to the best of  
23 my recollection, we have two. One looks after our largest  
24 customer of the U.S., that's Henry Schein. And the other  
25 one looks after the second largest customer in the U.S. and

1 that's Patterson Dental.

2 Q What does the academy team of 3Shape, Inc., do?

3 A We mainly training of the resellers, so making  
4 sure the reseller staff is well trained. They will also at  
5 the request of a reseller train end users so if someone  
6 bought a TRIOS scanner and the reseller does not have  
7 resources to train that user, they will request 3Shape to  
8 do that training.

9 Q Does 3Shape, Inc., sell any 3Shape products?

10 A No.

11 Q Which 3Shape entity sells TRIOS scanners to  
12 3Shape's U.S. resellers?

13 A 3Shape TRIOS.

14 Q Does any 3Shape entity hold any TRIOS scanners  
15 in the U.S. that are for sale?

16 A No.

17 Q Does any 3Shape entity hold any TRIOS scanners  
18 in the U.S. that are not for sale?

19 A Yes.

20 Q What are those TRIOS scanners for?

21 A A number of things. Mainly they are -- each of  
22 our territory managers and academy staff has a number of  
23 demo -- TRIOS demo units so they can use that to present to  
24 our resellers' representatives in the field. Also the  
25 training department has a number of scanners. We have what

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1 we call a cart system so we can send out -- if we're doing  
2 a training and education session, if we're doing a congress  
3 or other events, we can send out scanners that can be  
4 available at these types of events.

5 And also we have what we call an express  
6 replacement program. So if a dentist has a TRIOS scanner,  
7 and that TRIOS scanner is under warranty, we will replace  
8 that within 48 hours if it doesn't work. So we will do  
9 what we call an express replacement.

10 Q Are any of the TRIOS scanners that 3Shape holds  
11 in the U.S. new products?

12 A There could be some new products. So if a  
13 dentist has received a scanner, we call dead on arrival, so  
14 it doesn't work upon them picking it out of the box, we  
15 will in our express replacement program ship the scanner to  
16 the dentist so they get a completely new scanner.

17 Q Does 3Shape hold any refurbished scanners in the  
18 United States?

19 A Yes.

20 Q What are those used for?

21 A Those are used -- if you are covered by the  
22 warranty today and your scanner is more than three months  
23 old, you will typically get an equivalent unit. So let's  
24 say you've had a scanner for a year and it breaks down,  
25 we'll replace it with a scanner that is one-year old, or



1 attempt to get it in a scanner that's equivalent to what  
2 the dentist would have beforehand.

3 Q Since you started in August of 2016, has 3Shape  
4 ever offered any of the TRIOS scanners that it holds in the  
5 U.S. for sale?

6 A To the best of my knowledge, no.

7 Q Is there any situation in which 3Shape would  
8 sell the TRIOS scanners that it holds in the U.S.?

9 A I don't believe so, no.

10 Q Does 3Shape's order system allow 3Shape, Inc.,  
11 to invoice TRIOS scanners?

12 A I don't believe so.

13 Q Are you aware that at one point there was an  
14 interface so TRIOS scans could be sent to Invisalign?

15 A Yes.

16 Q And do you recall when Align announced that they  
17 would close that interface?

18 A Yes.

19 Q When was that?

20 A December 2017.

21 Q And, generally, did the closure of that  
22 interface affect 3Shape?

23 A Yes.

24 MR. SHAW: Your Honor, we're going to need to go  
25 on the 3Shape confidential record for a little sales



1 information.

2 JUDGE CHENEY: Okay. We're on the 3Shape  
3 confidential record. If you're not authorized to view  
4 3Shape information, please leave the hearing room.

5 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 MR. SHAW: I pass the witness, Your Honor.

3 JUDGE CHENEY: Any cross-examination?

4 MS. ONDRICK: Yes, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. ONDRICK:

7 Q Good afternoon, Mr. Melchior.

8 A Good afternoon.

9 Q The TRIOS scanner has compatibility with other  
10 clear aligners, correct?

11 JUDGE CHENEY: I'm sorry to interrupt. Can we  
12 be on the public record or no?

13 MS. ONDRICK: Yes, we can be on the public  
14 record for this part.

15 JUDGE CHENEY: We're on the public record, and  
16 we'll start that with the cross-examination.

17 BY MS. ONDRICK:

18 Q In fact, 3Shape considers its product an open  
19 system, correct?

20 A Yes.

21 Q And 3Shape has interoperability with almost all  
22 of the clear aligner companies, right?

23 A I don't know if we have with all.

24 Q Okay. I guess we'll check on that. And you had  
25 that type of clear aligner compatibility before Invisalign

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1 interoperability; isn't that right?

2 A I don't know how many of those were operational  
3 before the Invisalign interoperability.

4 Q Do you think you had Invisalign -- excuse me,  
5 clear aligner compatibility with most of the clear aligner  
6 companies out there in the market?

7 A Honestly, I don't know. I mean, there's a lot  
8 of companies out there, and I'm not sure how many of them  
9 we have interoperability with.

10 Q So you don't know how many you have  
11 interoperability with?

12 A I don't know the specific number, no.

13 Q You don't know if it's most?

14 A No.

15 Q How about many? Do you know if it's many?

16 A I would say we have -- in most of the bigger  
17 markets we have with some of the more established products.  
18 But I know, you know, let's say in Korea, there are 40  
19 different aligners, to the best of my knowledge, and I'm  
20 not sure we have with any of them.

21 MS. ONDRICK: Can we go ahead and pull up  
22 Mr. Melchior's deposition transcript at 260. Starting at  
23 line 14. Excuse me, we'll take line 19.

24 A Sorry, I didn't hear that.

25 Q Not for you, sir. I can put up it up on the

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1 Q And 3Shape actually benefitted from Invisalign  
2 interoperability, correct?

3 A Yes.

4 Q And 3Shape made more money because of Invisalign  
5 interoperability, correct?

6 A Yes.

7 Q 3Shape recognized more revenue because of  
8 interoperability, correct?

9 A Yes.

10 Q 3Shape wanted Invisalign interoperability,  
11 correct?

12 A I was not part of that discussion, so -- but  
13 certainly there was a benefit to 3Shape to have the  
14 interoperability.

15 Q Because it would make more money, right?

16 A We were making more sales, yes.

17 Q And 3Shape continues to have Invisalign  
18 interoperability outside the U.S., right?

19 A That's correct.

20 Q And 3Shape continues to submit scans originating  
21 from outside the U.S., right?

22 A Correct.

23 Q And 3Shape hasn't closed down the connection for  
24 Invisalign interoperability, has it?

25 A No, because we know customers would like to have

1 the interoperability.

2 Q And 3Shape continues to receive that benefit  
3 from Invisalign capability, at least outside the U.S.,  
4 right?

5 A Yes.

6 Q So customers are buying the TRIOS because of  
7 that interoperability, right?

8 A I don't think customers are buying it only  
9 because of the interoperability, but it is a feature and a  
10 benefit of the 3Shape product.

11 Q Well how about those lost sales you pointed to?  
12 People are returning products. They were returning it  
13 because there was no longer Invisalign interoperability,  
14 right?

15 A There were some customers who chose to return  
16 the scanner, but not all.

17 Q For the customers who returned the scanner, they  
18 returned it because the scanner lacked Invisalign  
19 interoperability, correct?

20 A I think it's an assumption and it's a fair  
21 assumption, but, of course, we would need to ask those  
22 customers why they returned. But that was the reason given  
23 to us by Henry Schein. We did not talk to those customers  
24 directly.

25 Q So you don't know why they returned them?

1           A       We were told by Henry Schein that they were  
2     returning it because of the loss of interoperability.

3           Q       Excuse me, you said what? It kind of slurred  
4     together.

5                   JUDGE CHENEY: I will repeat the transcript.  
6                   We were told by Henry Schein that they were  
7     returning it because of the loss of interoperability.

8           Q       Was that Invisalign interoperability?

9           A       Yes, because the loss of Invisalign  
10    interoperability.

11          Q       So Invisalign interoperability drove the sales  
12    of those TRIOS scanners, right?

13          A       It was definitely part of -- one of the reasons  
14    why our TRIOS scanner was selling well in North America,  
15    correct.

16          Q       Please answer the question, sir.

17                   MS. ONDRICK: Move to strike as nonresponsive.

18                   THE WITNESS: Could you repeat the question,  
19    please?

20                   JUDGE CHENEY: I'll repeat it.

21                   So Invisalign interoperability drove the sales  
22    of those TRIOS scanners, right?

23          A       It contributed, definitely, yes.

24          Q       It drove those sales, right?

25          A       Again, I think you would need to ask the

1 dentists why they bought the scanner.

2 Q So you don't know why, then? You can't have it  
3 both ways, sir. Either the Invisalign interoperability  
4 drove the sale or you don't know why. It's one or the  
5 other.

6 A I'm sorry, I have to stand by my answer. If you  
7 need to know why a dentist bought the TRIOS scanner, you  
8 would need to ask the dentist.

9 Q So then I guess you wouldn't agree with me that  
10 3Shape never would have made those sales if doctors  
11 required Invisalign?

12 A Again, I think Invisalign interoperability is a  
13 feature -- an attractive feature of the TRIOS scanner, but  
14 at the end of the day the doctor buys it because of  
15 multiple things.

16 Q So if a TRIOS scanner is returned because  
17 there's no longer Invisalign interoperability, that's not  
18 the reason for the return? Is that your testimony?

19 A I think, as I said earlier, they were returned  
20 to Henry Schein, and Henry Schein said that the loss of  
21 interoperability was the reason why it was returned.

22 Q So you don't know, though, why they were  
23 returned then; you just accepted what Henry Schein said at  
24 face value, or did you believe what Henry Schein said?

25 A Of course we believed what Henry Schein said.



1 Q So then they were returned because of a lack of  
2 Invisalign interoperability, correct?

3 A Again, if that's the assumption, we can say  
4 that, yes.

5 Q Okay. So we'll go with that as an assumption.  
6 So if we assume that a scanner was returned for  
7 a lack of Invisalign interoperability, we can also assume  
8 that Invisalign interoperability drove the sale, right?

9 A Again, we believe it was a key feature and  
10 benefit of the TRIOS scanner. But, again, you would need  
11 to ask the specific dentist why they buy the scanner, and I  
12 think there are many reasons why they buy it.

13 But for sure Invisalign interoperability was a  
14 key part of buying the scanner..

15 MS. ONDRICK: Move to strike as nonresponsive.

16 JUDGE CHENEY: I'll strike the answer as  
17 nonresponsive. I'll repeat the question for you, sir.

18 So we'll go with that as an assumption. So if  
19 we assume that a scanner was returned for lack of  
20 Invisalign interoperability, we can also assume that  
21 Invisalign interoperability drove the sale, right?

22 THE WITNESS: And I -- yes, it had a key benefit  
23 and a key feature of the TRIOS scanner.

24 JUDGE CHENEY: Okay. If you have a further  
25 explanation, you can explore that with your counsel.

1 Q So if a customer originally purchased a TRIOS  
2 scanner because of Invisalign interoperability and then  
3 cancelled it, we can assume that the only reason the  
4 customer bought the scanner was because of Invisalign  
5 interoperability. We have that established now, right,  
6 sir?

7 A To the best of my knowledge, there are multiple  
8 scanners in the market with Invisalign interoperability,  
9 and they still chose to buy the TRIOS scanner. So they  
10 could have bought another scanner if it was only for  
11 Invisalign interoperability.

12 MS. ONDRICK: Move to strike as nonresponsive.

13 JUDGE CHENEY: So here's -- the difficult  
14 exercise that we're doing here, and it's a little bit  
15 artificial, it's something we don't do in everyday  
16 conversation, so the way cross-examination generally works  
17 is, if counsel asks you a yes-or-no question, you should  
18 respond with one of three ways: Yes, no, or I don't know.

19 For example, if the question were loaded with a  
20 bunch of assumptions that you don't agree with, then you  
21 could say, I don't know the answer to that.

22 But I think what counsel is trying to get you to  
23 do is just clarify if you agree with certain of her  
24 propositions or not. And if you don't, you just say no,  
25 and you can explore it with your counsel. And if you do,

1 you can just say yes, and she'll move on.

2 Do you have any questions about that?

3 THE WITNESS: No. Thank you.

4 JUDGE CHENEY: Okay.

5 Let me repeat the last pending question.

6 So if a customer purchased a TRIOS scanner  
7 because of Invisalign interoperability and then cancelled  
8 it, we can assume that the only reason the customer bought  
9 the scanner was because of Invisalign interoperability. We  
10 have established that now, right, sir?

11 THE WITNESS: No, I don't agree.

12 JUDGE CHENEY: Okay.

13 Q Let's go back to this, then.

14 You have compensated your company, 3Shape has  
15 compensated Henry Schein for purported returned scanners;  
16 is that correct?

17 MR. SHAW: Your Honor, I think we need to be on  
18 the confidential record for this.

19 I'm sorry to interrupt.

20 JUDGE CHENEY: I don't think -- actually, I  
21 don't know the answer, so let's go on the confidential  
22 record.

23 (Confidential session follows.)

24

25

1 OPEN.SESSION CONTINUED

2 JUDGE CHENEY: Sorry, for the transcript, we're  
3 on the public record.

4 BY MS. ONDRICK:

5 Q And I think your title at 3Shape is vice  
6 president of global sales and customer care, correct?

7 A That's correct.

8 Q And your job is to sell the portfolio of 3Shape  
9 products, correct?

10 A It's one of my responsibilities, yes.

11 Q And the head of the North America region for  
12 3Shape reports to you, correct?

13 A That's correct.

14 Q And together with the head of the North America  
15 at 3Shape, you worked to build the local commercial  
16 organization, right?

17 A That's correct.

18 Q And you told us about that in your testimony.  
19 One of those organizations was a sales organization, right?

20 A We call it a commercial organization.

21 Q And there was a sales organization within that.

22 A Again, we call it a commercial organization.

23 Q And you have 20 to 30 people in the sales  
24 organization, correct?

25 A We have them in the commercial organization,

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1 yes.

2 Q So if we could go to your deposition testimony,  
3 page 24, starting at line 9.

4 Question: And how could you describe what you  
5 mean by build up the local community organization at least  
6 as that pertains to the United States?

7 Answer: --

8 A Sorry, I didn't -- could you repeat the  
9 question, please?

10 Q Sure.

11 So I think we're on the wrong page. So if we  
12 could start at page 24, and we're going to have to start  
13 actually at line 4 because there's a clarification in  
14 there.

15 Is that fair, sir? Do you see that, at line 4?

16 A Yeah.

17 Q Okay.

18 And how -- can you describe what you mean by  
19 build up the local community organization at least as that  
20 pertains to the United States?

21 Answer: What do you mean by "the local  
22 community organization"?

23 Question: Let me see. Oh, excuse me,  
24 commercial organization.

25 Answer: So the commercial organization in North

1 America has a marketing organization.

2 Question: Mm-hmm.

3 Answer: It was what we call business

4 development organization. It has account management, so

5 managing our resellers, and also has a sales organization,

6 and we have three regional business managers.

7 That was your answer at your deposition,

8 correct?

9 A Yes.

10 Q At your deposition you had a sales organization,

11 correct, sir?

12 A Yes.

13 Q And then, sir, continuing down.

14 Do you know --

15 Excuse me, let's go to page 43. Take a look at

16 line 21.

17 Do you know approximately how large the sales

18 organization is in the U.S.?

19 Answer: Between 20 and 30 people.

20 Question: And are they all located in the U.S.?

21 Answer: I believe, yes.

22 That was the question and answer at the

23 deposition, correct?

24 A Yes.

25 Q And those personnel, they're with 3Shape, Inc.,

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1 correct?

2 A That's correct.

3 Q Now, 3Shape does a fair amount of trade shows in  
4 the U.S., right?

5 A Yes.

6 Q And the U.S. trade shows are an important part  
7 of the responsibilities of the 3Shape sales organization in  
8 the United States, right?

9 A Yes.

10 Q And 3Shape displays products at these shows in  
11 the U.S., correct?

12 A That's correct.

13 Q And 3Shape displays at least one, probably more  
14 than one, TRIOS scanner at these U.S. trade shows, correct?

15 A Yes.

16 Q And 3Shape also displays certain software  
17 products at the U.S. trade shows, correct?

18 A Yes.

19 Q And you will display the most relevant products  
20 for end users attending the trade show, and that could  
21 software, fair?

22 A Yes.

23 Q And when 3Shape puts up its products for display  
24 at U.S. trade shows, they are displaying for end users, not  
25 resellers, right?



1 A Yes.

2 Q So you know companies go to these -- companies  
3 like 3Shape go to these trade shows to show products to  
4 doctors, right?

5 A Yes.

6 Q And one of the things that companies do at these  
7 dental and orthodontic trade shows is try to sell products,  
8 right?

9 A I mean, for 3Shape we're trying to promote our  
10 product. We're not selling the product.

11 MS. ONDRICK: Move to strike, nonresponsive..

12 JUDGE CHENEY: I will grant it.

13 The question is, So you know companies go to  
14 these -- companies like 3Shape go to these trade shows to  
15 show products to doctors, right?

16 THE WITNESS: Of course, I know companies go  
17 to -- other companies will go to these trade shows. But  
18 for 3Shape, because we're not selling in the U.S., we're  
19 going there to promote our product and create brand  
20 awareness of our product.

21 JUDGE CHENEY: Okay. I'm going to try again.  
22 And if your answer is yes or no, just say that. And if  
23 you're unable to do that, just let me know and then your  
24 counsel can explore it with you.

25 Here's the question again: So companies go to

1 these -- companies like 3Shape go to these trade shows to  
2 show products to doctors, right?

3 THE WITNESS: I don't know.

4 Q Do you go to trade shows, sir?

5 A Sometimes, yes.

6 Q And you have gone to trade shows in the U.S.,  
7 correct?

8 A That's correct.

9 Q You've gone to orthodontic trade shows, right,  
10 in the U.S.?

11 A No. I have not attended an orthodontic show in  
12 the U.S.

13 Q Have you gone to a dental show in the U.S.?

14 A I have attended a dental show in the U.S.

15 Q Well, we're good then.

16 And one of the things that companies at these  
17 dental trade shows that you've been to do is try to sell  
18 their products to dentists, right?

19 A Yes.

20 Q And they actually do that at the show, right?

21 A I don't know.

22 Q Companies at shows don't take orders? You don't  
23 know?

24 A I don't know.

25 Q Okay.

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1 Does 3Shape track how many sales it makes at  
2 U.S. trade shows through resellers?

3 A We try and get feedback from resellers, but we  
4 do not always get that, no. So we try and track it, but we  
5 don't always get that information.

6 Q So you do track it.

7 A We try and get the information from the  
8 resellers, but we don't necessarily know how much a  
9 reseller sells at a trade show.

10 Q But you do receive information about how much a  
11 reseller sells at a trade show on occasion, correct?

12 A Personally, I've never seen that information.

13 Q Okay.

14 And 3Shape, when it's at these trade shows in  
15 the U.S., it's demonstrating its products, right?

16 A Yes.

17 Q And it's demonstrating its TRIOS scanner,  
18 correct?

19 A Yes.

20 Q And it's demonstrating its software, correct?

21 A Yes.

22 Q The success of a trade show is determined based  
23 on the sales, isn't it?

24 A I don't know. Not only sales. For 3Shape they  
25 would mainly be leads. So customers who expressed an

1 interest in our product.

2 Q So when 3Shape is at these trade shows in the  
3 U.S., it's assisting with resellers to make a sale of a  
4 product, right?

5 A We are promoting our products for customers to  
6 learn about our products.

7 Q You're not trying to make a sale of a 3Shape  
8 TRIOS?

9 A No.

10 Q Or any 3Shape software?

11 A No.

12 Q And you're not assisting your resellers in  
13 making a sale of a 3Shape TRIOS or 3Shape software?

14 A May I explain what we do at the show?

15 Q Yes or no to assisting, sir.

16 Your counsel can ask you that if they want to.

17 A Okay.

18 I don't know if I would say we're assisting  
19 sales.

20 Q You would say you're not making a sale; is that  
21 fair?

22 A Yes, that's fair.

23 Q You don't know if you'd say if you're assisting  
24 in a sale; is that fair?

25 A That's fair.

1 . Q Would you say you're supporting a sale?

2 Yes or no.

3 A I don't know -- I don't know -- I don't know.

4 Q You don't know if you're supporting a sale in  
5 the U.S., okay.

6 Are you soliciting a sale in the U.S. at a trade  
7 show?

8 A From my understanding, could you explain what  
9 you mean by "soliciting"?

10 Q You're trying to get somebody to buy your TRIOS,  
11 trying to get somebody to buy your software.

12 A Again, I don't know if that's what we're doing.

13 Q If you were at a trade show and a dentist came  
14 up and wanted to buy a TRIOS, would you turn that sale  
15 down, or would you -- would you turn it down?

16 A If a dentist came up to 3Shape at a trade show  
17 and they were interested in buying a TRIOS, we would ask  
18 that dentist to go over to our reseller. We would  
19 typically walk the dentist over to the reseller and then  
20 the reseller would have to take that opportunity and do the  
21 sale.

22 Q So then if a dentist asks you at a trade show to  
23 buy a TRIOS through one of your resellers, you wouldn't  
24 turn that down, would you?

25 A We would ask the dentist -- we would walk with

1 the dentist over to the reseller, and then the dentist  
2 would have the dialogue with the reseller who would then be  
3 making the sale.

4 Q So are you soliciting interest in your products  
5 when you're at the trade show in the U.S.?

6 A Yes.

7 Q But is it your testimony that you're just not  
8 soliciting sales when you're at the trade show in the U.S.?

9 A Yes.

10 Q Okay.

11 Do you recall a meeting that you had with  
12 Heartland in 2017? We talked about it at your deposition.

13 Do you recall that one?

14 A Yes.

15 Q And you went to that meeting, correct, with  
16 Heartland?

17 A Yes. I had a number of meetings with Heartland,  
18 yes.

19 Q Let's just focus on that one if that's okay.  
20 Can we do that?

21 A Is that the October meeting at Heartland?

22 Q That's correct.

23 A Yes.

24 Q And you came to the U.S. for that meeting,  
25 right?

1           A       I was visiting a number of our resellers in the  
2   U.S.

3           Q       Let's just focus on the one, okay?

4                   Can we do that?

5           A       Yes, but you said I came to the U.S. for that  
6   meeting. So I was --

7           Q       You were in the U.S. for that meeting, correct,  
8   sir?

9           A       That's correct.

10          Q       So you visited with Heartland in the United  
11   States, right?

12          A       That's correct.

13          Q       All right. And you were looking to present your  
14   product to Heartland, right?

15          A       That's correct.

16          Q       And that product included the TRIOS, right?

17          A       Yes.

18          Q       And you were presenting because you thought they  
19   were interested in having TRIOS as part of their intraoral  
20   scanners right?

21          A       Yes.

22          Q       And you know they were interested in buying  
23   TRIOS -- the 3Shape products, right?

24          A       Yes.

25          Q       And you were there from -- with U.S. 3Shape



1 , personnel, right?

2 A Yes.

3 Q The U.S. business development organization of  
4 3Shape supports resellers so they can do their job, right?

5 A Yes.

6 Q And the job of the resellers, at least to you,  
7 is to make a sale, right?

8 A Yes.

9 Q And the resellers attempt to sell 3Shape  
10 products, right?

11 A Yes..

12 Q And the 3Shape sales organization in the U.S.  
13 also supports resellers, right?

14 A Yes.

15 Q And one thing that people in the U.S. sales  
16 organization of 3Shape do is go to customer, potential  
17 customers sites with the reseller, right?

18 A Yes.

19 Q In fact, if a reseller who is attempting to sell  
20 3Shape products wanted a 3Shape employee to accompany the  
21 reseller on a customer visit, they would reach out to a  
22 3Shape regional business manager, right?

23 A Yes.

24 Q And you have three of those region business  
25 managers in the U.S., right?

1 A Yes.

2 Q 3Shape's customer care after sales support helps  
3 resellers too when they call with a product issue, right?

4 A Yes.

5 Q And if the reseller can't solve the problem,  
6 they hand it off to 3Shape, right?

7 A Yes.

8 Q And such 3Shape personnel may be responsible for  
9 solving that end user's problem, right?

10 A Yes.

11 Q And it's important for 3Shape to provide after  
12 sale customer support to end users, right?

13 A Yes.

14 MS. ONDRICK: I have no further questions.

15 JUDGE CHENEY: Okay. Is there any redirect for  
16 Mr. Melchior?

17 MR. SHAW: Just two questions, Your Honor.

18 JUDGE CHENEY: Can we be on the public record or  
19 not?

20 We are back on the public record.

21 REDIRECT EXAMINATION

22 BY MR. SHAW:

23 Q You were asked about a sales organization during  
24 cross. Do you recall that?

25 A Yes.

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1 Q Is that called anything else?

2 A We call it a commercial organization.

3 Q And what does the commercial organization of

4 3Shape, Inc., do?

5 A They support our resellers at the local level so

6 if a reseller requires training of their staff or if they

7 are going to visit a dentist and they would like a 3Shape

8 personnel to participate in the visit to be the product

9 expert, then we will be there for that.

10 MR. SHAW: No further questions, Your Honor.

11 JUDGE CHENEY: Okay. Any other questions before

12 I excuse Mr. Melchior?

13 MS. ONDRICK: No, Your Honor.

14 JUDGE CHENEY: Thank you, Mr. Melchior, for

15 coming in. You may be excused.

16 THE WITNESS: Thank you.

17 (Witness excused.)

18 MR. SHAW: Your Honor, 3Shape is calling

19 Kristian Hansen. We're going to bring him in from outside.

20 JUDGE CHENEY: Okay.

21 Please stand and raise your right hand.

22 (Oath administered.)

23 JUDGE CHENEY: Please be seated.

24 Counsel, proceed when you're ready.

25 KRISTIAN HANSEN,

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1 having been first duly sworn, was examined and testified as  
2 follows:

3 DIRECT EXAMINATION

4 BY MR. LIU:

5 Q Can you please state your name for the record?

6 A Kristian Hansen.

7 Q Mr. Hansen, who is your current employer?

8 A 3Shape TRIOS A/S.

9 Q And what is your current position at 3Shape  
10 TRIOS A/S?

11 A I'm a project manager for the TRIOS education  
12 software.

13 Q How long have you been at that position?

14 A Seven years.

15 Q And did you have any position at 3Shape prior to  
16 your current position?

17 A Yes. I had three years as a software developer  
18 and team leader for quality control project called  
19 Convince, and two years at software developer and team  
20 leader for TRIOS application software.

21 Q When did you start your position as TRIOS  
22 software developer?

23 A 2009.

24 Q And when did 3Shape begin development of the  
25 TRIOS software?

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1 A In 2009.

2 Q And what is TRIOS software?

3 A TRIOS software is a Windows application running  
4 on an external PC responsible for constructing the  
5 three-dimensional model from the scanner data.

6 Q And what do you mean by external PC?

7 A It's the -- the PC in TRIOS Cart or TRIOS Move  
8 or off-the-shelf PC if it's a TRIOS part system.

9 MR. LIU: Your Honor, I'm going to be going on  
10 to the 3Shape confidential record.

11 JUDGE CHENEY: What's the nature of the  
12 information?

13 MR. LIU: This is a confidential 3Shape document  
14 that aim going to..

15 JUDGE CHENEY: What is it about?

16 MR. LIU: It's about the technical operation of  
17 the 3Shape software.

18 JUDGE CHENEY: Okay. We've had a substantial  
19 amount of testimony on the public record about this. Is  
20 this at some level of detail that's particularly unique?

21 MR. PATNAIK: Your Honor, this is different than  
22 what's been talked about before.

23 JUDGE CHENEY: Okay. Let's see where we go.  
24 We'll go on the 3Shape confidential record. If you're not  
25 authorized to view 3Shape confidential information, please

1 leave the hearing room.

2 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: We're back on the public record.

3 CROSS-EXAMINATION

4 BY MR. CONSILVIO:

5 Q Hello, Dr. Hansen. Nice to see you again.

6 A Nice to see you.

7 Q I'm going to try and be brief. I know you've  
8 got a flight to catch.

9 A Thank you.

10 Q So I know you may have covered a little bit of  
11 this, but I just want to start with some basics.

12 You have familiarity with the TRIOS 3 system;  
13 isn't that correct, Dr. Hansen?

14 A Yes.

15 Q And the TRIOS 3 system includes a scanner wand  
16 coupled to a computer, right?

17 A Correct.

18 Q And the wand houses an FPGA processor; is that  
19 correct?

20 A Yes.

21 Q And the computer coupled to the wand also has a  
22 processor, right?

23 A Correct.

24 Q So the data that's sent from the FPGA processor  
25 to the wand processor -- sorry, strike that.

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1                   Data is sent from the FPGA processor to the  
2 wand -- from the wand to the processor on the computer,  
3 correct?

4           A       Correct.

5           Q       And that's scan data, right?

6           A       Correct.

7           Q       And you referred to earlier you called that a  
8 sub-scan package; is that right?

9           A       Yes, that was one of the --

10          Q       Okay. So data from the FPGA is sent to the  
11 computer in the form of sub-scan packages; is that right?

12          A       Yes, that was one of the data types, yes.

13          Q       And each sub-scan package includes the necessary  
14 information from a sub-scan for building a color  
15 three-dimensional model, correct?

16          A       No.

17          Q       It doesn't?

18          A       No.

19          Q       The computer that is coupled to the wand  
20 includes software called ScanSuite; is that right?

21          A       Correct.

22          Q       And that receives the sub-scan packages,  
23 correct?

24          A       Yeah, correct.

25          Q       And ScanSuite just translates the data format

1 into something that the TRIOS software application can  
2 understand; is that right?

3 A Yeah, correct, together with the encoder  
4 packages.

5 Q Okay. And the TRIOS application software  
6 resides on the PC, right, the computer?

7 A Yeah, correct.

8 Q Along with ScanSuite?

9 A Correct.

10 Q And the TRIOS application software puts all the  
11 sub-scans together and builds a three-dimensional model;  
12 isn't that right?

13 A Yeah, correct.

14 Q And that's a color model?

15 A Correct.

16 MR. CONSILVIO: I think I do need to go on to  
17 the confidential record at this point to discuss details of  
18 the -- further details of the processing.

19 JUDGE CHENEY: Okay.

20 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: We're back on the public record,  
3 and the Respondents have called their next witness, Allan  
4 Hyldal. We'll probably just get him sworn in before it's  
5 time for the break, so let's take our break now. We'll  
6 resume at 3:11. We're off the record.

7 (Recess from 2:56 p.m. until 3:12 p.m.)

8 JUDGE CHENEY: Please take your seats. We're  
9 back on the public record in Investigation 337-TA-1091. We  
10 are about to hear from Allan Hyldal, who's been called by  
11 Respondents..

12 Sir, will you please stand and raise your right  
13 hand, and I will swear you in.

14 (Oath administered.)

15 JUDGE CHENEY: Please be seated.

16 Mr. Patnaik, proceed when you're ready.

17 MR. PATNAIK: Thank you, Your Honor.

18 ALLAN HYLDAL,  
19 having been first duly sworn, was examined and testified as  
20 follows:

21 DIRECT EXAMINATION

22 BY MR. PATNAIK:

23 Q Can you please state your full name for the  
24 record?

25 A My name is Allan Hyldal.

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1 Q Do you speak English fluently?

2 A I do.

3 Q Are you currently employed?

4 A I am.

5 Q Who is your current employer?

6 A 3Shape A/S.

7 Q How long have you worked for 3Shape?

8 A I joined the company in December of 2013.

9 Q What is your current title?

10 A I am vice president of 3Shape orthodontics.

11 Q What are your current job responsibilities as VP  
12 of orthodontics?

13 A I oversee the overall business strategy, and  
14 then I have the direct responsibility for product  
15 management and product marketing. And then I work with our  
16 subsidiaries to help develop their local business  
17 strategies and support them with resources for trade shows  
18 and such.

19 Q Have you held any other positions at 3Shape?

20 A When I was hired my title was director of the  
21 orthodontic business unit, but that title was later  
22 converted into the vice president role.

23 Q As VP of orthodontics, are you familiar with  
24 3Shape's Ortho System software?

25 A Yes.

1 Q What is Ortho System?

2 A It is a collection of functionality that enables  
3 orthodontists and orthodontic lab technicians to analyze an  
4 orthodontic treatment case and treatment-plan it, and then  
5 subsequently design and manufacture sort of different types  
6 of appliances.

7 Q Who is the target end user of Ortho System?

8 A That would be orthodontic lab technicians and  
9 orthodontists with in-house labs.

10 Q What software falls under the Ortho System  
11 umbrella?

12 A Can you say that again?

13 Q Sure. Sorry. What software falls under the  
14 Ortho System umbrella?

15 A That would be -- the two main modules would be  
16 Ortho Analyzer and Appliance Designer.

17 Q What is Ortho Analyzer?

18 A So Ortho Analyzer is a -- it's a module that  
19 enables the user to analyze the intraoral situation and to  
20 treatment-plan -- to plan the treatment, basically.

21 Q What is Appliance Designer?

22 A That's a CAD software tool that enables the  
23 orthodontist or the user to design various types of  
24 appliances.

25 Q Are you familiar with something called Virtual

1 Setup?

2 A Yes.

3 Q Can you please describe it briefly?

4 A So Virtual Setup is a part of Ortho Analyzer  
5 that enables a user to simulate a treatment plan. So use  
6 the setup software to create a virtual setup and the user  
7 functionality to simulate extractions or interproximal  
8 reductions so that the doctor can -- and also that the user  
9 can, you know, do various scenarios for how the treatment  
10 could be done before he actually starts doing it on the  
11 patient.

12 Q Are you familiar with something called Edit  
13 Flexible Tissue?

14 A Yes.

15 Q Can you briefly describe Edit Flexible Tissue?

16 A It is a feature inside Ortho Analyzer that  
17 enables a user to basically cut the teeth from the gingiva.

18 Q Is Edit Flexible Tissue a feature of Virtual  
19 Setup?

20 A No, it's not.

21 Q Are you familiar with the functionality known as  
22 Indirect Bonding?

23 A Yes.

24 Q Can you briefly describe Indirect Bonding?

25 A It's a collection of features and functions that

1 enables the doctor or the user to place brackets virtually  
2 on the model set and use the prescription of the brackets  
3 to plan the treatment and then subsequently design what's  
4 called a transfer media, which is a sort of appliance that  
5 can be used to virtually -- not virtually but indirectly  
6 transfer the brackets into the mouth of the patient.

7 Q Are Virtual Setup, Edit Flexible Tissue, or  
8 Indirect Bonding part of 3Shape's Dental System software?

9 A No, it's not.

10 Q Do you know what Splint Designer is?

11 A Yes.

12 Q What is it, if you could briefly describe it?

13 A Splint Designer is a -- it's a specific workflow  
14 that enables the user to design various types of splints  
15 such as mouth guards and night guards and sports guards.

16 Q Is Splint Designer available within Dental  
17 System?

18 A It's a module that's sold separately that can be  
19 sold with Dental System, yes.

20 Q Are there any differences in Splint Designer as  
21 it appears in Ortho System or as it appears as an add-on  
22 for Dental System?

23 A Yes, there is. As it appears in Ortho System,  
24 it's an integral part of the Appliance Designer. So it's  
25 an integral part of the Ortho System workflow. When it



1 appears from Dental System, it's a stand-alone module  
2 without a database. It's basically just an external  
3 function that's called from the Dental System and then  
4 returns the case back to Dental System again.

5 Q Is Virtual Setup part of Splint Designer?

6 A No.

7 Q Does the copy of Splint Designer in Dental  
8 System share data with Virtual Setup?

9 A No.

10 Q Is Edit Flexible Tissue part of Splint Designer?

11 A No.

12 Q Does the copy of Splint Designer in Dental  
13 System share data with Edit Flexible Tissue?

14 A No.

15 Q Is Indirect Bonding part of Splint Designer?

16 A No.

17 Q Does the copy of Splint Designer in Dental  
18 System share data with Indirect Bonding?

19 A No.

20 Q Is it possible for a user to purchase either  
21 Ortho System or Dental System without the other?

22 A Yes.

23 Q Are Ortho System and Dental System sold  
24 separately?

25 A Yes, they are.

1 Q Is it possible for a user to purchase both Ortho  
2 System and Dental System?

3 A Yes.

4 Q Are Ortho System and Dental System ever sold as  
5 one integrated product?

6 A No, they're not.

7 Q If a user purchases both Ortho System and Dental  
8 System, will they have one version of Splint Designer?

9 A No, they will have two.

10 Q If a customer buys Ortho System without  
11 hardware, how is that software delivered?

12 A It's downloaded from our cloud service.

13 Q If a customer gets updates of Ortho System, how  
14 is that software update delivered?

15 A It's also delivered through the cloud.

16 Q If you could turn in your binder to --

17 MR. PATNAIK: Actually, we do need to go on the  
18 3Shape confidential record, Your Honor.

19 JUDGE CHENEY: What's the nature of the  
20 information?

21 MR. PATNAIK: The document itself, Your Honor,  
22 is confidential. We have had testimony on it, snippets of  
23 it, in different parts that counsel and I have let it go on  
24 the screen, but not the whole document. I can just have  
25 him -- I don't need it on the screen right now.

1 JUDGE CHENEY: If we can stay on the public  
2 record and just look at the binder, that would be great.

3 MR. PATNAIK: We can do that.

4 Q Mr. Hyldal, can you look at what's been marked  
5 as CX-858C, please.

6 A Yes.

7 Q Do you recognize this document?

8 A Yes.

9 Q What is it?

10 A That is a software specification for Ortho  
11 System 2017-1.

12 Q Does it address any specific issues?

13 A Can you say that again, please?

14 Q Does it address anything specific about Ortho  
15 System?

16 A It shows how the different integration  
17 capabilities in Ortho System are laid out.

18 Q And how is integration used in the context of  
19 this document?

20 A So integration basically means that there is a  
21 well-defined interface between Ortho System and any of the  
22 modules or systems that are described in this document.

23 Q Does that mean that Dental System and Ortho  
24 System act together as one product?

25 A No. It actually means the opposite, that

1 there's a well-defined interface between the two systems  
2 and there's a well-defined protocol for how data is  
3 exchanged, just as there are a well-defined protocol for  
4 how data is exchanged with practice management systems.

5 Q Is that because they're separate products?

6 A Yes.

7 Q Are you familiar with the Complainant Align  
8 Technology?

9 A I am.

10 Q Have you had any professional interactions with  
11 Align since joining 3Shape?

12 A Yes. Ever since I joined in December of '13,  
13 I've had several interactions with them. I mean, it's a  
14 small industry, so we tend to meet each other at trade  
15 shows, and at every congress, there's a round, and I've  
16 been in dialogue with them since pretty much the beginning  
17 of my tenure to talk about how we could integrate TRIOS to  
18 Invisalign.

19 Q Was a contract to integrate 3Shape TRIOS  
20 scanners with Invisalign ultimately signed?

21 A Yes.

22 MR. PATNAIK: Same thing, Your Honor, I'm going  
23 to speak about a confidential document right now, but it  
24 doesn't -- we don't need to go on the confidential record  
25 because I'm not going to show it quite yet.

1 JUDGE CHENEY: Okay.

2 MR. PATNAIK: But when I do, I will have to  
3 switch to confidential.

4 JUDGE CHENEY: Okay.

5 Q Could you please turn in your binder to JX-163C,  
6 please.

7 A Yes.

8 Q Do you recognize this document?

9 A Yes.

10 Q What is it?

11 A That is the agreement that Align Technology and  
12 3Shape ultimately signed that would define how the TRIOS  
13 scanner could be used to send cases to Invisalign.

14 Q Do you remember when it was executed?

15 A That was in December of 2015.

16 Q You said that 3Shape and Align had been  
17 discussing some type of integration before you joined; is  
18 that right?

19 A That's correct.

20 Q Can you describe the initial interactions with  
21 Align regarding the interface?

22 A Yes. When I joined the company, one of the  
23 first tasks I was given by our CEO, Flemming Thorup, was to  
24 try to establish an interoperability agreement between  
25 TRIOS and Invisalign. And so I was consulting with our

1 teams that had had dialogue with Align in the past, and  
2 from -- based on that, I reached out to Srini Kaza to start  
3 the dialogue and see if there was an interest of opening up  
4 the dialogue about the integration again.

5 Q Are you familiar with something called a  
6 validation process with respect to the interoperability?

7 A Yes. One of the information that we got from  
8 Align was that there was a quite rigorous validation  
9 process we had to go through in order to prove that the  
10 scanner was qualified to send to Invisalign.

11 Q Do you recall what the validation process  
12 entailed?

13 A So it was quite a rigorous process that entailed  
14 that 3Shape had to scan at least a hundred patients with at  
15 least ten different doctors and ten different scanners with  
16 the objective to prove both the accuracy of the scanner but  
17 also the repeatability of the workflow for the doctor. And  
18 so the purpose was to establish not only a qualification of  
19 the scanner but also a smooth workflow for the operator.

20 Q Who from 3Shape was handling discussions with  
21 Align?

22 A I was.

23 Q Sorry, about interoperability?

24 A I was handling those discussions.

25 Q Who was the primary counterpart from Align?

1 A At this point this would have been Srini Kaza.

2 Q Were there discussions about TRIOS/Invisalign  
3 integration -- strike that.

4 Did your discussions with Mr. Kaza and Align  
5 continue through December 2015 when the scanner agreement  
6 was eventually signed?

7 A No. The discussions were terminated again after  
8 a couple of months.

9 Q Do you know why they were terminated?

10 A I was informed by Mr. Kaza that Align had  
11 decided not to proceed, that Tim Mack of the company had  
12 made the decision not to proceed with 3Shape.

13 Q Do you know why Mr. Mack called off the  
14 discussions?

15 A At the time, we were informed that this was for  
16 business reasons.

17 Q Were there any other reasons identified?

18 A We were also informed that there were legal  
19 reasons.

20 Q Do you know what they meant by "legal reasons"?

21 A Well, we were informed by Mr. Mack that there  
22 was some patent infringement issues that had to be resolved  
23 before we could proceed with the agreement. And so at the  
24 time, the discussions were terminated.

25 Q Do you know whether 3Shape ever asked Mr. Mack



1 to provide any further information about those patent  
2 allegations?

3 A Mr. Thorup, who was the CEO of the company at  
4 the time and who had known Tim Mack from before, he reached  
5 out to Mr. Mack and asked for an explanation, and Mr. Mack  
6 never came back to us about it.

7 Q Did you hear from anywhere else any allegations  
8 of patent infringement?

9 A Yeah. We did hear from others that there had  
10 been -- that there were reasons -- patent infringement  
11 reasons which meant that Align probably would not be  
12 validating the scanner.

13 MR. PATNAIK: I do need to go to the  
14 confidential record now, Your Honor.

15 JUDGE CHENEY: Okay. Whose confidential  
16 information is this?

17 MR. PATNAIK: This is 3Shape confidential.

18 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: We're on the public record.

3 BY MR. PATNAIK:

4 Q Can you once again look at JX-163C in your  
5 binder, Mr. Hyldal.

6 A Yes.

7 Q Can you show me where you believe the scanner  
8 agreement acknowledges 3Shape's work with other clear  
9 aligner companies, please?

10 A Yes. So if you turn to page 1, section 1.1 -- I  
11 believe it's the last paragraph. It says, likewise, the  
12 parties agree that supplier may enable and provide scans  
13 from supplier's products to other providers of orthodontic  
14 treatment systems, including other manufacturers of clear  
15 aligners.

16 Q Can you also show me where you believe the  
17 scanner agreement acknowledges 3Shape's Ortho System  
18 software, please?

19 A Yes. Turn to page 3, section 3.6, I think it's  
20 the first paragraph on page 3, it says, Align acknowledges  
21 that supplier [inaudible] software solution currently  
22 contains functionality that can be used to analyze a set of  
23 digital impressions, help diagnose a patient's oral  
24 situation, plan a treatment, and simulate tooth movement in  
25 a virtual setup using supplier's treatment planning

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1 software. This functionality is used by supplier's  
2 customers internationally for treatment planning and by  
3 labs for manufacturing of indirect bonding, retainers,  
4 splints, sleep apnea appliances, and other types of  
5 orthodontic appliances, which would include clear aligners.

6 Q How did 3Shape feel about entering into the  
7 scanner agreement with Align?

8 A I mean, we were excited. This was a great  
9 opportunity, we felt, for both companies.

10 Q Did 3Shape and Align ever publicly announce the  
11 TRIOS/Invisalign interoperability?

12 A Yes. We made -- I think we made two public  
13 announcements, one when the agreement was signed and later  
14 when the interoperability was actually commissioned.

15 MR. PATNAIK: Before I continue, Your Honor, I  
16 noticed that the JX version that we put on the screen was  
17 basically illegible. Can I work with counsel and get the  
18 most legible copy of this agreement for the exhibit  
19 binders?

20 JUDGE CHENEY: That would be great.

21 MR. PATNAIK: For what we submit eventually. I  
22 don't mean for this witness.

23 JUDGE CHENEY: Maybe you can also take a stab at  
24 redacting and having a public version that has a similar  
25 number or something like that.

1 MR. PATNAIK: We'll take a look.

2 JUDGE CHENEY: Since you're going to all that  
3 effort.

4 MR. PATNAIK: Sure.

5 Q Mr. Hyldal, can you turn to JX-246, please, in  
6 your binder.

7 A Yes.

8 Q Do you recognize this document?

9 A Yes. This is the joint press release that was  
10 made between Align and 3Shape announcing that -- the new  
11 workflow of integrating the TRIOS scanner with the  
12 Invisalign case submission workflow.

13 Q Did 3Shape need to do anything to establish that  
14 interface?

15 A We did. I mean, at the time -- as I mentioned  
16 before, we already had several integrations to other  
17 treatment providers at the time, but Align had a different  
18 way of doing it that they wanted us to pursue. So we had  
19 to build quite a lot of back-end functionalities to support  
20 the integration process.

21 Q Did 3Shape and Align complete the validation and  
22 eventually open the interface?

23 A We did.

24 Q When did that happen?

25 A That happened in October of 2016.

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1 Q Was it surprising for it to take almost a year  
2 to validate it?

3 A Yeah. I think it took a lot longer than it had  
4 to. I was informed by Mr. Kaza that it was due to some  
5 internal SAP upgrade issues that Align was having at the  
6 time, and so -- you know, I don't think we got a really  
7 credible explanation for why it was. We were surprised.

8 Q Can you turn to RX-1279, please.

9 A Yes.

10 Q Do you recognize this document?

11 A Yes. This is the press release that was issued  
12 when the first TRIOS scan was sent for Invisalign case  
13 submission.

14 Q Did 3Shape change any of its business practices  
15 based on the interface opening?

16 A We did. I mean, part of the discussion, and  
17 that's also reflected in the agreement, was that 3Shape had  
18 to present and promote Invisalign as our preferred clear  
19 aligner partner. So we created a special website and we  
20 made it very, very easy for doctors to connect to  
21 Invisalign. And so we did not do that for any other of our  
22 integration partners at the time.

23 Q You had not promoted any other clear aligner  
24 partners before that?

25 A We had basically listed them so that they were

1 known to people, but we did not promote any of them  
2 actively.

3 Q And did any of them have a separate website like  
4 Align did?

5 A No, none of them had a separate website.

6 Q From 3Shape's perspective, was the interface  
7 between TRIOS and Invisalign successful?

8 A It was very successful. I mean, pretty much  
9 from the time we announced the integration, a lot of  
10 doctors started to sign up to be on board when the  
11 integration eventually opened. And after the integration  
12 opened, we saw a -- I would say even a surprisingly fast  
13 growth of cases being submitted. It was very successful.

14 Q How do you know how many doctors signed up and  
15 how many TRIOS cases were sent to Invisalign?

16 A So part of the on-boarding process, we were  
17 obliged to on-board people in a certain way, train them in  
18 how to scan and train them in how to send. And so  
19 everybody was signing up on our website and we were  
20 on-boarding them one at a time. So we knew exactly who the  
21 doctors were.

22 Q Do the treatment providers also have access to  
23 information about the TRIOS customer sending the scans?

24 A Yes. So each individual scanner is directly  
25 connected to the provider. So the provider would know

1 exactly which TRIOS users are sending them cases.

2 Q And was that true for all the TRIOS/Invisalign  
3 interface scans?

4 A It was, yes. So they knew exactly who the  
5 customers were.

6 MR. PATNAIK: Your Honor, now I do need to go on  
7 the 3Shape confidential.

8 JUDGE CHENEY: Okay.

9 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: We're back on the public record.

3 BY MR. PATNAIK:

4 Q What was 3Shape's perspective on the  
5 TRIOS/Invisalign interface when Align sued 3Shape in  
6 November 2017?

7 A Well, we certainly felt that it was a successful  
8 partnership we had at the time. We felt that it was an  
9 integration that was beneficial to both companies  
10 commercially. We were selling more TRIOS scanners and they  
11 were selling so many more Invisalign cases. So we were  
12 surprised that they sued us.

13 I mean, we had known about the, you know, patent  
14 allegations from way before we started, and we had  
15 commercially agreed on the interoperability agreement, the  
16 scanner agreement, and so, you know, we were surprised that  
17 they were bringing these things up again.

18 Q Did 3Shape ever consider terminating or not  
19 renewing the scanner agreement?

20 A No.

21 Q Did 3Shape ever consider closing or asking Align  
22 to close the TRIOS/Invisalign interface?

23 A No, we did not.

24 Q Did 3Shape close the iTero Dental System  
25 interface?

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1 A No, we did not, and it is still open today.

2 Q After Align sued 3Shape, did you have a chance  
3 to speak with anyone at Align about the status of the  
4 scanner agreement and interface and how they might be  
5 affected by the lawsuits?

6 A Yeah.

7 Our marketing director, Lars Lohn [ph] and  
8 myself, we met with Raphael Pascaud at Greater New York in,  
9 must have been November of 2017. And I explicitly asked  
10 him about it, about this, and he confirmed that Align had  
11 no intentions of closing the interface.

12 Q Did you do anything with that information?

13 A Well, later when they eventually did close the  
14 interface, we communicated it to the market in a press  
15 release.

16 Q Had you told management about that  
17 communication?

18 A I had. We had -- obviously Lars and myself had  
19 brought that information back to the management group and  
20 had -- I mean, tried to establish an understanding that we  
21 believed that they were not going to close the interface.

22 Q Could you please turn to what's been marked  
23 JX-249.

24 A Yes.

25 Q Do you recognize this document?

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1           A       Yes. That is the press release I was referring  
2   to.

3           Q       And this was issued shortly after the  
4   termination?

5           A       It was. This was issued on December 19.

6           Q       Other than your discussion with Mr. Pascaud, did  
7   you hear anything between October of 2016 and December of  
8   2017 about whether or not Align would close the interface?

9           A       Yeah, we did. I mean, that was -- pretty much  
10   from the time when the interface agreement was signed, we  
11   started to hear rumors in the market that Align was never  
12   going to build the interface.

13          Q       How frequent were those rumors?

14          A       I would say that rather frequent, maybe a couple  
15   times every quarter.

16          Q       Did you speak with anyone at Align about those  
17   rumors?

18          A       I did speak with Raphael Pascaud about it, and  
19   he assured me that this was just, you know, a couple of  
20   reps going loose and that it had nothing to do with Align's  
21   corporate strategy, if you will.

22                   MR. PATNAIK: Your Honor, can we go back on  
23   3Shape confidential, please.

24                   JUDGE CHENEY: What's the nature of the  
25   information?

1 MR. PATNAIK: Internal business documentation.

2 (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 BY MR. PATNAIK:

3 Q Can you turn to JX-165, please.

4 A Yes.

5 Q Do you recognize this document?

6 A Yes. This is the press release that Align  
7 issued where they informed the market that they have  
8 discontinued accepting scans from the TRIOS scanner in the  
9 United States.

10 Q This press release says that, The cutoff for  
11 accepting new Invisalign cases from TRIOS scanners in the  
12 U.S. will be January 31st, 2018.

13 Do you know if the U.S. interface was closed on  
14 that day?

15 A It was not.

16 Q How do you know that?

17 A Well, we -- like I said before, we monitor the  
18 cases that are being sent, and several months later there  
19 was a meeting and there was some e-mail interactions  
20 between the Align development team and the 3Shape  
21 development team by which the Align development team would  
22 inform us that the interface had not been closed.

23 And then a little later on, on May 22, that as  
24 of today, the interface now was closed.

25 Q That's May 22, 2018?

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1           A     May 22, 2018. And this is from new cases. Of  
2     course, it still remained open for existing cases.

3           Q     The last sentence in the first paragraph of the  
4     press release says --

5                     JUDGE CHENEY: I'm sorry, why is all this  
6     conversation about a press release released to the market  
7     confidential?

8                     MR. PATNAIK: I'm sorry, Your Honor, it could  
9     have been public, starting with the introduction of the  
10    exhibit.

11                    JUDGE CHENEY: We're back on the public record.

12                    (A discussion was held off the record.)

13                    JUDGE CHENEY: Now continue, Counsel.

14    BY MR. PATNAIK:

15           Q     The last sentence of the first paragraph of the  
16     press release says, Doctors who need to submit additional  
17     TRIOS scans for an existing Invisalign case for refinement  
18     or additional aligners will still be able to do so.

19                    Do you understand what that means?

20           A     It means that if a doctor started an Invisalign  
21     case with his TRIOS scanner prior to Align announcing the  
22     termination, that doctor would still be able to continue to  
23     send refinement cases also after the date of the  
24     termination.

25           Q     Do you know how long those refinement cases

1 could go?

2 A For Invisalign full cases, that could be up to  
3 five years.

4 Q Do you know if Align has since closed the  
5 interface for these additional TRIOS scans?

6 A They have not.

7 Q What were your thoughts when you learned that  
8 Align was terminating the scanner agreement and closing the  
9 interface?

10 A Well, I was obviously surprised and I was also  
11 very disappointed. Again, we felt that it was a very good  
12 business relation that we had with Align and that it was a  
13 win-win situation for both companies.

14 And, also, I was obviously very disappointed  
15 that Align -- or that Raphael had told me that they  
16 wouldn't shut it down and then shortly thereafter they did  
17 it anyway.

18 Q Did termination of the interface have any effect  
19 on 3Shape's sales?

20 A It did. It did affect our sales, especially in  
21 the U.S.

22 MR. PATNAIK: Your Honor, I do need to go back  
23 to 3Shape confidential now.

24 JUDGE CHENEY: Okay.

25 (Confidential session follows.)



1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: We're back on the public record.

3 BY MR. PATNAIK:

4 Q After Align terminated the agreement and closed  
5 the U.S. interface, did you speak with anyone from Align  
6 regarding whether the interface would be closed outside of  
7 the U.S.?

8 A I did. Again, I spoke with Raphael Pascaud and  
9 asked him about it. I mean, it was actually a bit of a  
10 difficult situation for us because we only had one global  
11 agreement and after that had been terminated, we didn't  
12 really have any guidance or governance for what to do  
13 outside of the U.S.

14 So I asked Raphael what we were going to do  
15 about it. He confirmed that it was unclear, and he  
16 promised that he would come back -- I think this was in the  
17 beginning of the year -- come back with a conclusion or a  
18 solution for how we were going to manage it, but I never  
19 heard back from him.

20 Q To your knowledge, has Align closed the  
21 TRIOS/Invisalign interface outside of the U.S.?

22 A No, it's still open today.

23 Q Do you have any information about why Align is  
24 still accepting TRIOS scans outside the U.S.?

25 A No, I don't.

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1 Q Did Align get any benefit from terminating the  
2 scanner agreement?

3 A Well, obviously they had clear visibility into  
4 who our customers were and, you know, from the letter that  
5 we looked at before, they approached all of the TRIOS  
6 customers with a very attractive offer where they could get  
7 50 percent off on an iTero scanner.

8 And, also, since they -- since they announced  
9 the termination and things around it just before Christmas,  
10 we heard back from doctors that had already gone on  
11 Christmas holiday and didn't come back until sometime in  
12 January that they had very little time to make a decision,  
13 and a lot of people felt forced to take the offer and --  
14 because they had to keep their business going, basically.

15 Q Going back to your comment about the TRIOS  
16 customer base, why would a doctor make the switch to iTero?

17 A Well, for many doctors, the Invisalign business  
18 is a significant part of their business. It's a  
19 significant part of their revenue stream. And so if they  
20 can't maintain that business, they basically had to buy the  
21 iTero scanner.

22 Q Did you attend the AAO Align town hall meeting  
23 in Washington, D.C., in May 2018?

24 A Yes, I did.

25 Q Who from Align participated in that town hall?

1           A       That would have been their general counsel,  
2       Roger George, it would have been their general manager for  
3       North America, Chris Puco, and I believe the CTO, Zelko  
4       Relic.

5           Q       Was 3Shape brought up during Align's comments at  
6       the town hall meeting?

7           A       Yeah. There were basically three topics on the  
8       agenda and 3Shape was the first topic. And I think it was  
9       Roger George who explained -- I mean, they get a chance to  
10      explain the situation, and they said that they felt --  
11      Align felt that the partnership with 3Shape had gone in a  
12      wrong direction from their perspective, and, therefore,  
13      they wanted to bring back some of the old IP issues, and,  
14      therefore, they had to terminate the interface.

15          Q       Can you turn to RX-1290 in your binder.

16          A       Yes.

17          Q       Do you recognize this exhibit?

18          A       Yes. This is a transcript from the town hall  
19      meeting.

20          Q       Mr. Hyldal, knowing what you know today, would  
21      3Shape have made the investments that it did in creating  
22      the interface and validating the TRIOS scanner?

23          A       No, we would not. I mean, it was a waste of  
24      time and a waste of money. We're basically back to square  
25      one, where we were when we started in 2013, only with the

1 difference that, you know, we haven't had any opportunity  
2 to promote our other clear aligner partners and promote our  
3 software, and so we kind of lost a lot of time in that  
4 perspective.

5 Q Is that because you were promoting Invisalign?

6 A We were promoting Invisalign during that period,  
7 yes.

8 Q And it was more than the other clear aligners?

9 A We did not really promote any of the other clear  
10 aligners, according to the agreement we had with Align.

11 MR. PATNAIK: I pass the witness, Your Honor.

12 JUDGE CHENEY: Is there any cross-examination of  
13 this witness?

14 MR. JACOBS: There is, Your Honor.

15 CROSS-EXAMINATION

16 BY MR. JACOBS:

17 Q Good afternoon, Mr. Hyldal. It's good to see  
18 you again.

19 A Likewise.

20 Q Thank you for coming to Washington D.C. We  
21 appreciate it.

22 A Thank you.

23 Q You mentioned that you were responsible at  
24 3Shape for negotiating the interoperability agreement,  
25 right?

1 A Correct.

2 Q So you have pretty deep knowledge relating to  
3 that agreement.

4 That would be true, right?

5 A Yes, I would say so.

6 Q And let's just level set.

7 You admit that there was absolutely nothing  
8 improper with Align's decision to terminate the  
9 interoperability agreement.

10 You admit to that, correct?

11 A That is correct.

12 Q In fact, the interoperability agreement  
13 expressly states that either party can terminate for  
14 convenience, right?

15 A I believe so, yeah.

16 Q As long as 30 days' notice is provided, it was  
17 mutually agreeable to both companies that it could be  
18 terminated at will, right?

19 A Right.

20 Q And Align did, in fact, provide that 30 days'  
21 notice to 3Shape that the interoperability agreement was  
22 being terminated.

23 Fair enough?

24 A Fair enough.

25 Q The agreement, just so we all understand it,

1     only had a three-year term.

2                 That's true as well, isn't it, sir?

3             A     As I recall it, yes.

4             Q     So it was set to expire in December of 2018

5     under the express provisions of the agreement.

6                 True, sir?

7             A     Yeah, I believe so.

8             Q     Now, you agree, sitting here today, that even if

9     Align's motive for terminating the interoperability

10    agreement was to maintain its market share in clear

11    aligners, there would be nothing wrong with that.

12                 You agree with that, right?

13             A     I believe that they could terminate it at will

14    or for convenience, yes.

15             Q     Right.

16                 So just so we all understand, let's get a clear

17    answer on this.

18                 You agree that even if Align's motive for

19    terminating the interoperability agreement was to maintain

20    its market share in clear aligners, there's nothing wrong

21    with that.

22                 You agree with that, don't you, sir?

23             A     They could terminate it for convenience, yes.

24             Q     So there's nothing wrong with Align terminating

25    this agreement if they wanted to keep their market share in

1 clear aligners.

2 Yes. Correct?

3 A Correct.

4 Q Thank you.

5 So trying to maintain market share and improve  
6 market share, that's what all companies do.

7 Fair enough?

8 A Fair enough.

9 Q Okay. So Align filed these patent infringement  
10 suits in November of 2017, correct?

11 A Yep.

12 Q And after that, 3Shape did not ask its U.S.  
13 resellers to stop selling the products accused of  
14 infringement, did you?

15 A No, I don't think we did.

16 Q To the contrary. 3Shape continued to encourage  
17 its resellers to sell in the United States the 3Shape  
18 products that were accused of infringement.

19 True, sir?

20 A I don't exactly know what we encouraged them to  
21 do. I didn't have that dialogue myself.

22 Q Are you aware that you have told your resellers  
23 not to sell?

24 A No.

25 Q Thank you.

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1           And you understand, sir, that encouraging the  
2   sale of products in the United States that infringe another  
3   company's patents is illegal.

4           Do you understand that?

5           A     It sounds reasonable.

6           Q     You've done nothing since the termination of the  
7   interoperability agreement to stop cases from being  
8   submitted from the TRIOS to the Invisalign in the United  
9   States, have you?

10          A     No. We're not in a position to do that.

11          Q     And you've done nothing to stop cases outside of  
12   the United States. You haven't written to Align and asked  
13   them to stop that, have you?

14          A     No, we've not.

15          Q     And you are benefitting financially each time a  
16   TRIOS submits an Invisalign case.

17                Fair enough?

18          A     No, we don't get anything out of that.

19          Q     Nothing at all, okay.

20                You joined 3Shape at the end of 2013; is that  
21   right?

22          A     That's correct.

23          Q     When you joined, you took over the  
24   responsibility within 3Shape for communicating with Align.  
25   I think you've told me that before.

1 Is that right?

2 A That's correct.

3 Q Let's go, if we could, and take a look -- you  
4 have a binder from us as well, sir.

5 MR. JACOBS: And, Your Honor, I believe this  
6 next document is a confidential internal 3Shape document.

7 JUDGE CHENEY: Okay.

8 Let's go off the record for a minute.

9 (A discussion was held off the record.)

10 JUDGE CHENEY: Hearing no objection, we're back  
11 on the record, the public record right now.

12 And where were you leading us, Mr. Jacobs?

13 MR. JACOBS: Yes, Your Honor. There was a  
14 .3Shape document that I was going to look at. It is  
15 RX-813C.

16 Let me do this, Your Honor. I'll ask some  
17 questions, and if I can get the answers that I need, then I  
18 don't need to pull the document up. I'll just go ahead and  
19 proceed on the public record, Your Honor.

20 JUDGE CHENEY: Okay.

21 Q Mr. Hyldal, in 2014, 3Shape and Align were  
22 discussing potential interoperability; is that correct?

23 A Yes.

24 Q But 3Shape failed its initial prescreening with  
25 Align at that point in time, right?

1           A       No, I don't believe so.

2           Q       3Shape failed due to problems with its  
3 aligners -- I mean, with its scanners, right?

4           A       No, I don't think we came to a conclusion on  
5 that.

6           Q       Okay.

7                   MR. JACOBS: Let's go ahead and -- we're going  
8 to have to, Your Honor, go on the confidential record now.

9                   JUDGE CHENEY: Okay. 3Shape confidential  
10 record.

11                   (Confidential session follows.)

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1 OPEN SESSION CONTINUED

2 JUDGE CHENEY: Okay. We're back on the public  
3 record.

4 BY MR. JACOBS:

5 Q And you looked a little bit at the  
6 interoperability agreement during your direct examination.  
7 It is JX-0163; is that right, sir?

8 A Yes, that's correct.

9 Q Now, the agreement is between 3Shape TRIOS A/S,  
10 and you were not a 3Shape TRIOS A/S employee.

11 That is correct, right, sir?

12 A That is correct.

13 Q Now, please take a look at section 4 of the  
14 agreement, if you could, please.

15 A Yes.

16 Q This provision relates to intellectual property;  
17 is that correct?

18 A Correct.

19 Q Now, you recall that during your deposition, you  
20 told me that you suggested edits to this provision during  
21 the negotiations that led to the agreement, right, sir?

22 A Yes.

23 Q The intent of the changes that you made were to  
24 make sure that 3Shape maintained its intellectual property  
25 rights and that Align separately maintained its

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1 intellectual property rights, correct, sir?

2 A Correct.

3 Q Now, also section 4 has a statement in it, and I  
4 think we can pull just this statement up. It's a statement  
5 relating to license, if we could, please.

6 So within section 4, it states that, No license  
7 or right is granted by implication or otherwise with  
8 respect to any patent, and then it goes on to say, not  
9 specifically set out in the agreement.

10 So the agreement basically states expressly that  
11 no license is being provided either implicitly or expressly  
12 with regard to patents that aren't specifically set out in  
13 the agreement, right, Mr. Hyldal?

14 A Correct.

15 Q And specific Align patents are not mentioned  
16 anywhere in the interoperability agreement, true, sir?

17 A True.

18 Q So, therefore, you agree that clearly Align  
19 maintained all of its intellectual property rights to its  
20 patents notwithstanding that it entered into the  
21 interoperability agreement with 3Shape. Fair enough?

22 A I don't think I can judge the legal conclusion  
23 on that, but it was definitely implicit understanding that  
24 Align was authorizing us to use our scanner for the  
25 agreement.

1 Q Well, I asked you something very similar at your  
2 deposition. So you have your deposition in your binder, if  
3 you could, please, sir. And I'm going to direct your  
4 attention to the transcript. You're going to have a  
5 transcript there, and it's going to have page numbers, and  
6 it's going to have some line numbers. If you could turn to  
7 page 305, lines 10 through 18.

8 And in your deposition, I said, You agree --

9 A Just one second.

10 Q And it's on the screen in front of you as well,  
11 sir.

12 I said, You agree that each party maintains its  
13 distinct intellectual property rights under the term of the  
14 scanner agreement, right?

15 You said, Unless it specifically mentioned that  
16 is accepted.

17 And I said, Right. And Align's patents are not  
18 specifically mentioned in the scanner agreement. You can  
19 agree with that, sir?

20 And you said, Yes.

21 So that was your testimony there and that's  
22 correct today; isn't it, sir?

23 A That's correct.

24 Q So section 18, if we can turn back to the  
25 agreement, please. That's JX-0163.

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1                   This is the governing law provision of the  
2 scanner agreement. I think you probably remember, sir, we  
3 talked about this a good bit during your deposition, do you  
4 remember that?

5           A       Yes.

6           Q       Now, it states in section 18, This agreement and  
7 any dispute or claim arising out of it or in connection  
8 with it, and then it goes on to say, shall be governed in  
9 accordance with the laws of Denmark.

10                   Now, Mr. Hyldal, you understand what the word  
11 "arise" means in this context. It means coming out of or  
12 in relation to, right?

13          A       Yes.

14          Q       So the governing law provision does not state  
15 that it covers a dispute coming out of or in relation to  
16 any intellectual property disputes between the parties. It  
17 doesn't expressly state that, does it?

18                   MR. PATNAIK: Your Honor, the line of  
19 questioning is basically calling for legal conclusions and  
20 interpretation of a contract. He's never -- we haven't  
21 asked that he provide legal opinion.

22                   MR. JACOBS: Your Honor, if you recall, this is  
23 a position that has been maintained and I believe the Court  
24 ruled with regard to a summary determination motion that  
25 there might be some factual issues that still relate to



1 this very question, and this is the individual who drafted  
2 the agreement. He was involved in the negotiations that  
3 pertained even to this clause.

4 JUDGE CHENEY: My memory might not be as good as  
5 yours, Mr. Jacobs. Can you point any in my order to where  
6 I said there were some factual issues?

7 MR. JACOBS: I have to get the order.

8 JUDGE CHENEY: I remember a part of the order  
9 that said, if you think there's a problem here, you can go  
10 to a District Court and get an injunction stopping this  
11 case, and no one did. That's the part I remember.

12 MR. JACOBS: I remember that part as well. I'm  
13 fine with that part, Your Honor.

14 JUDGE CHENEY: No one did that.

15 MR. JACOBS: I agree with you, Your Honor.

16 JUDGE CHENEY: Okay.

17 MR. JACOBS: We'll move on, okay?

18 Q So turn to JX-0319 in your witness binder, if  
19 you could, Mr. Hyldal.

20 A Yes.

21 Q And at the bottom of the first page, there's an  
22 e-mail from Mr. Pascaud to you, among others, it's dated  
23 December 3, 2015. That was a time period when you were  
24 still negotiating the agreement; is that correct, sir?

25 A Yes, I would say so.

1 Q And you'll see that Mr. Pascaud wrote to  
2 Flemming Thorup and he copied you on a message stating  
3 that, Align was okay with 3Shape's suggested approach  
4 except for any patent IP matters which would need to be  
5 dealt with in the appropriate courts.

6 You see that language there, sir?

7 A Yes.

8 Q And you --

9 MR. PATNAIK: Your Honor, I thought we just  
10 decided we're going to move on from this issue.

11 MR. JACOBS: Your Honor, I'm asking him to  
12 clarify exactly what's in the agreement. They've made this  
13 agreement into a big deal during this investigation. If  
14 they want to drop the issues that they've raised relating  
15 to the agreement, then we're happy to move on, but they  
16 have refused to do so.

17 MR. PATNAIK: Your Honor, we lost the venue  
18 issue, and this is all about venue.

19 MR. JACOBS: This is about licensing, Your  
20 Honor. This is about what the agreement relates to, what  
21 it pertains to and where disputes would have to be  
22 resolved.

23 JUDGE CHENEY: Can you-all just stop talking for  
24 a minute?

25 Mr. Patnaik, I think your objection is to a

1 discussion about the state of mind that is represented in  
2 JX-319C? Is that what you're saying?

3 MR. PATNAIK: No, Your Honor. My objection is  
4 to talking about the venue provision when we were just told  
5 that they're not relitigating the order that we lost on the  
6 motion to transfer.

7 JUDGE CHENEY: So what I'm seeing here is that  
8 he's directing the witness's attention to the bottom of  
9 JX-319C and asking about the time period negotiating the  
10 agreement. Is that your understanding of what the pending  
11 question is about?

12 MR. JACOBS: Yes, Your Honor. It was just  
13 before the agreement was entered into.

14 JUDGE CHENEY: I'm asking Mr. Patnaik.

15 MR. PATNAIK: I wasn't sure what the e-mail was  
16 about. I just saw the choice of law and the Amsterdam and  
17 Copenhagen and the line, except for any patent IP-related  
18 matters which would need to be dealt with in the  
19 appropriate courts, that to me falls under the umbrella of  
20 choice of law, choice of venue.

21 JUDGE CHENEY: Okay. Overruled.

22 Continue, sir.

23 MR. JACOBS: Thank you, Your Honor.

24 Q So in response to this e-mail to Mr. Thorup that  
25 you were copied on, Mr. Hyldal, you did not oppose what

1 Mr. Pascaud was expressing in the e-mail, and, in fact, you  
2 entered into the agreement just a few weeks later; isn't  
3 that correct, sir?

4 A Yes.

5 Q So you told me during your deposition,  
6 Mr. Hyldal, that you were not aware of 3Shape monitoring  
7 competitors' patents. Do you recall that?

8 A Can you say that again?

9 Q Sure. You told me during your deposition that  
10 you were not aware of 3Shape monitoring its competitors'  
11 patents. Do you recall that?

12 A I don't recall exactly how we say it, but we  
13 don't consistently monitor competitors' patents.

14 Q In fact, in 2017 you yourself asked for, I think  
15 it was mid part of 2017, a pretty big analysis of Align's  
16 patents; isn't that true, sir?

17 A Yes, I believe so.

18 Q And, if you recall, as part of your monitoring  
19 of Align's patents, at one point in time, you wrote to  
20 somebody within the company that you might not be able to  
21 use ClinCheck until at least 2020 because of Align's  
22 patents. Do you recall that correspondence, sir?

23 MR. PATNAIK: Your Honor?

24 JUDGE CHENEY: What is the objection?

25 MR. PATNAIK: We're talking about documents that

1 we ruled earlier could not be introduced in this court.

2 MR. JACOBS: Your Honor, it's cross-examination.

3 I can refresh his recollection. I can ask him questions.

4 I'm not moving to admit this as an exhibit. It's certainly  
5 fair game for questioning, Your Honor.

6 JUDGE CHENEY: Overruled.

7 MR. JACOBS: Thank you, Your Honor.

8 Q So you did at some point in time indicate with  
9 regard to the study in 2017 that 3Shape might not be able  
10 to make either simulator or ClinCheck until after 2020.

11 And you said, That is a problem.

12 Do you recall that, sir?

13 A I don't recall the actual wording of how that --

14 Q It sounds like something you could have said  
15 during that time period?

16 A Kind of depends on what the context of the  
17 sentence was.

18 (Reporter interruption.)

19 JUDGE CHENEY: I'm going to re-read the  
20 question.

21 You did at some point in time indicate with  
22 regard to the study in 2017 that 3Shape might not be able  
23 to make either simulator or ClinCheck until after 2020?

24 And you said, That is a problem.

25 Do you recall that, sir?

1 THE WITNESS: I don't recall exactly how those  
2 words were flowing, and I think it needs to be seen in the  
3 context of which it was written.

4 Q Sir, yes or no, do you recall that?

5 A I don't recall it to the words.

6 Q Sir, yes or no, do you recall that?

7 A No, then I don't recall it.

8 Q Can I direct your attention in your binder, if I  
9 could, please, sir, to CX-1602C.

10 MR. PATNAIK: Your Honor, I'm not objecting to  
11 the question. I'm just raising for the record that this is  
12 one of those documents that we talked about earlier today  
13 that were produced late.

14 MR. JACOBS: I'm not asking to have this  
15 admitted into evidence, Your Honor.

16 JUDGE CHENEY: Okay.

17 MR. JACOBS: Thank you, Your Honor.

18 Q So I want you to read to yourself, if I could --  
19 if you could, Mr. Hyldal, the e-mail that you wrote on June  
20 26, 2017, at 4:04 a.m., and it appears that you wrote it to  
21 a patent agent, a Ninne-Grønne within 3Shape. And if you  
22 could read that whole e-mail and continuation of. Can you  
23 read that to yourself, sir?

24 A Yes.

25 Q So having read that e-mail to yourself, does



1 that refresh your recollection about whether in June of  
2 2017, you stated to somebody, a patent agent within the  
3 company, that it looks like you could not make either  
4 simulator or ClinCheck until 2020, that is a problem? Does  
5 that refresh your recollection, sir?

6 A It does, yes.

7 Q Okay. So let's move on, if we could. Now, sir,  
8 answer one question for me. If you had a license in 2017  
9 to Align's patents, there would have been no problem with  
10 making ClinCheck and Simulator at that point in time if you  
11 had a license to their patents, right? That's correct,  
12 isn't it?

13 A Yeah, I would say so.

14 Q Thank you, sir.

15 Now, you stated on direct that you had a  
16 conversation with Mr. Pascaud at some point in time, and  
17 Mr. Pascaud raised some concerns I guess about intellectual  
18 property; is that right?

19 A Mm-hmm.

20 Q And we talked about this at your deposition. Do  
21 you recall that?

22 A Not exactly, no.

23 Q So Mr. Pascaud never said that it's going to be  
24 difficult to engage with 3Shape in an interoperability  
25 situation because actually this conversation between you



1 and Mr. Pascaud and Mr. Deichmann took place a little bit  
2 after the interoperability agreement was entered into. Do  
3 you recall that, sir?

4 A Are you referring to the meeting at Greater New  
5 York?

6 Q Yes, sir.

7 A Okay.

8 Q You recall that one now, sir?

9 A Yes, I do.

10 Q Okay. And so that was a follow-up meeting after  
11 the agreement had been entered into, true?

12 A Correct.

13 Q And neither you nor Mr. Deichmann ever followed  
14 up on this conversation from Mr. Pascaud, never got back to  
15 him on that one; is that right, sir?

16 A I don't believe we did, no.

17 Q And you did not take any step to check and see  
18 whether what Mr. Pascaud said might be something that  
19 3Shape should be concerned about, did you sir?

20 A We did not know anything specific about what he  
21 was referring to.

22 Q You didn't take any steps to check and see  
23 whether what Mr. Pascaud said might be something that  
24 3Shape should be concerned about. That's true, isn't it,  
25 sir?

1 A That's correct.

2 Q Thank you sir. So you mentioned trade shows  
3 during your direct examination. 3Shape attends a fair  
4 amount of trade shows. That's correct, right, sir?

5 A Yes.

6 Q You were at AAO I think you mentioned earlier  
7 this year; is that correct?

8 A Correct.

9 Q And at these trade shows, 3Shape is displaying  
10 its products such as its TRIOS, its Ortho System software.  
11 They're displaying that to the public and orthodontists,  
12 things of that nature, right, sir?

13 A Right.

14 Q And they demonstrate these products at trade  
15 shows because they're hoping that somebody will buy the  
16 products. That's fair, isn't it, sir?

17 A Yes.

18 Q And you work with resellers in the United  
19 States. That's correct, isn't it, Mr. Hyldal?

20 A Yes.

21 Q And you want those resellers to sell your  
22 products to customers in the United States. That's  
23 something that 3Shape generally wants, right, sir?

24 A Correct.

25 Q A couple of questions with regard to Splint

1 Designer, I want to confirm, Splint Designer is part of  
2 Ortho System, right?

3 A Correct.

4 Q And it can be called in Dental System as part of  
5 a separate module, fair enough?

6 A Right.

7 Q You said Ortho System was delivered to customers  
8 by the cloud. Do you recall that testimony?

9 A Yes.

10 Q That was not the case, just so that we're all  
11 clear, prior to February of 2018, true, sir?

12 A I don't exactly know which date it changed, but  
13 it's correct that in the past, it was done differently.

14 Q So just so that we all understand, this case was  
15 filed, and at some point in time after this investigation  
16 was filed, 3Shape decided to provide Ortho System and its  
17 software via the cloud. Fair enough?

18 A At some point in time. I don't know when it was  
19 done.

20 Q But you know it was after the filing of this  
21 case? You know that, don't you, sir?

22 A Yeah, I believe so.

23 Q Now, you discussed some interoperability  
24 discussions, and you mentioned that there was further joint  
25 development scenarios that were discussed between the

1 parties. That's fair, isn't it?

2 A Correct.

3 Q And you, in fact, were at a meeting at one point  
4 in time where Mr. Deichmann and you spoke with Mr. Pascaud  
5 I believe it was at that New York show about some possible  
6 joint ventures between the parties, right?

7 A Correct.

8 Q And you recall that what Mr. Deichmann proposed  
9 at that meeting was that Align close down its scanner  
10 division and serve as an OEM for 3Shape? You recall that's  
11 what he proposed, right, sir?

12 A I think he proposed that 3Shape would be willing  
13 to provide Align with scanning technology.

14 Q And basically as an OEM, right, sir?

15 A I don't think those words were used at the time.

16 Q You mentioned that -- Mr. Mack I think at some  
17 point in time you had heard had provided some information  
18 about potential IP concerns; is that right?

19 A Yes, I believe so.

20 Q There were no patent numbers that you ever heard  
21 about, that's true, right?

22 A That's true.

23 Q No open threats of lawsuits were raised by  
24 Mr. Mack to anybody directly that you ever heard about?  
25 That's right, sir, right?

1 A I didn't hear about that.

2 Q You mentioned non-exclusivity being important to  
3 3Shape as part of the negotiations with Align. That's  
4 true, isn't it?

5 A Yes.

6 Q And so 3Shape made sure that non-exclusivity  
7 actually was in the final written agreement between the  
8 parties, right?

9 A Yes.

10 Q So if receiving an express license, for example,  
11 was important to 3Shape as part of the negotiations with  
12 Align, you could have asked for and tried to get that into  
13 the interoperability agreement as well. That's fair  
14 enough, right, sir?

15 A Yes.

16 Q Now, you testified that 3Shape had put in some  
17 efforts and work as a result of the agreement with Align.  
18 Is that true, sir?

19 A Yes.

20 Q But you understand at the same time and you  
21 understood all along that the agreement between 3Shape and  
22 Align was mutually terminable at any point in time with 30  
23 days' notice? You knew that all along, right, sir?

24 A Yes.

25 JUDGE CHENEY: Okay. Seems like a nice place to

1 stop since it sounds very much like where you started. Is  
2 there going to be more cross-examination?

3 MR. JACOBS: I have a few more questions  
4 probably, Your Honor. I can do it now if you want me to.

5 JUDGE CHENEY: Let's do it now.

6 MR. JACOBS: Okay.

7 Q Now, you talked a little bit about Align  
8 accepting cases from TRIOS in 2018, I guess even in May of  
9 2018, right?

10 A Yes.

11 Q You don't think there's anything wrong with  
12 that. That's true, right?

13 A I find it just peculiar, but other than that,  
14 nothing wrong.

15 MR. JACOBS: Thank you.

16 I have no further questions, Your Honor.

17 JUDGE CHENEY: Okay.

18 MR. PATNAIK: Your Honor, short redirect so we  
19 can let the witness go so he doesn't have to come back  
20 tomorrow?

21 MR. JACOBS: We're not opposed to that.

22 MR. PATNAIK: I don't have much, just a little  
23 bit.

24 JUDGE CHENEY: Please keep it brief.

25 MR. PATNAIK: Thank you, Your Honor.

1 REDIRECT EXAMINATION

2 BY MR. PATNAIK:

3 Q Mr. Hyldal, you were asked some questions about  
4 the intent of the agreement with respect to Align  
5 maintaining its intellectual property. Do you remember  
6 that?

7 A Yes.

8 Q Did you understand that ownership of any patents  
9 was supposed to change hands because of the agreement?

10 A No.

11 Q What was your understanding?

12 A My understanding was that there was an  
13 understanding between the two parties that the TRIOS  
14 scanner was -- that 3Shape could use the TRIOS scanner to  
15 scan patients and send the cases to Invisalign.

16 Q And how about non-Invisalign cases?

17 A True, that was also brought into -- that was  
18 section 1.12, to other types of clear aligner providers,  
19 yes.

20 Q You testified before about the Ortho System?

21 A We were also -- it was also the intent of the  
22 agreement that 3Shape's existing Ortho software could  
23 continue to be used for orthodontic purposes.

24 Q Counsel asked you some questions about  
25 expiration of certain Align patents and an e-mail that he

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1 discussed. Do you recall that?

2 A Yes.

3 Q Do you recall getting any response from your  
4 questions or your comments from Mikal Ninne-Grønne?

5 A Yes. There was a brief assessment made of some  
6 patents.

7 Q Were there any specific concerns identified?

8 A There were some concerns raised, but this was  
9 based on a very early assessment, and we were starting to  
10 explore the area, if you will, and that's the extent that  
11 the investigation was made at -- at the time.

12 Q And what was the context? This was 3Shape  
13 looking into clear aligners?

14 A So you're referring to the investigation that  
15 was done in I think it was in June of -- summer of 2017?

16 Q Yes.

17 A So this was at a time where 3Shape was exploring  
18 what avenues we would be able to take, and that's basically  
19 where we came from at that point in time.

20 Q Do you have any familiarity with U.S. antitrust  
21 law?

22 A No, I don't.

23 MR. JACOBS: Your Honor, it's outside the scope,  
24 calls for legal testimony, totally irrelevant.

25 MR. PATNAIK: Your Honor, he asked if something

1 was proper under U.S. antitrust law to this witness.

2 MR. JACOBS: Your Honor, I will represent I did  
3 not ask that question.

4 JUDGE CHENEY: It's just talking about what he  
5 knows. I think we all know the answer. I'm going to  
6 overrule the objection.

7 MR. PATNAIK: And I'm going to end with one more  
8 question.

9 JUDGE CHENEY: The last question you asked was,  
10 Do you have any familiarity with U.S. antitrust law?

11 The answer was, No, I don't.

12 I overruled an objection. And now the ball is  
13 in your court.

14 Q Do you have any sense of what is proper or  
15 improper under U.S. antitrust law?

16 A No, I don't.

17 MR. PATNAIK: No further questions, Your Honor.

18 JUDGE CHENEY: Okay. Does anyone else have any  
19 questions for this witness before I release him?

20 MR. JACOBS: He may be released, Your Honor,  
21 thank you.

22 MR. PATNAIK: Nothing further, Your Honor.

23 JUDGE CHENEY: Thank you, sir. I appreciate  
24 your testimony. It helps me understand the case. You are  
25 released.

1 THE WITNESS: Thank you.

2 (Witness excused.)

3 JUDGE CHENEY: Any housekeeping matters anyone  
4 wants to talk about at the end of the day?

5 MR. JACOBS: Your Honor, I think that when  
6 Ms. Ondrick was conducting -- questioning a witness, it was  
7 an Internet document that came up and you asked that we  
8 assign a number to it. CX-1620 is the next number for the  
9 record.

10 JUDGE CHENEY: Okay. So CX-1620 is a printout  
11 of 3Shape's website purporting to show the different clear  
12 aligner brands that the 3Shape TRIOS is compatible with.  
13 Have I characterized that correctly? Anyone have any  
14 objection to that characterization?

15 MR. JACOBS: That's correct, Your Honor.

16 JUDGE CHENEY: Okay. Thank you. Any other  
17 housekeeping matters?

18 MR. PATNAIK: Nothing from us, Your Honor.

19 MR. JACOBS: Nothing further, Your Honor.

20 JUDGE CHENEY: So because I chided some people  
21 at the beginning of the investigation about not keeping to  
22 their witness estimates, I will note that the 60-minute  
23 examination of Mr. Hyldal went far beyond that. And I want  
24 to know where you-all stand on time. Can someone tell me  
25 some numbers?

1 MR. PATNAIK: Your Honor, we have numbers as of  
2 yesterday. I haven't seen a compilation for today as far  
3 as the split on the parties' respective time allocations.  
4 But we can do that tonight and meet and confer with counsel  
5 and come to you tomorrow morning with a status check.

6 JUDGE CHENEY: Okay. I want to hear time when  
7 we reconvene in the morning. So we've gotten through more  
8 than half of the hearing. That's great. And I can tell  
9 from the volume and speed of your voices that everyone is  
10 getting a little bit excited, maybe because you're tired.  
11 This is my pep talk to you to try to remain as professional  
12 as possible. I know that you're tired because I see the  
13 time stamps on your e-mails. And it looks like you're up  
14 all night. I don't know how you're doing it. But maybe go  
15 for a walk tonight. It's beautiful weather. Get your  
16 blood pressure lowered. Think about something other than  
17 this investigation for 15 minutes. And you're all doing a  
18 yoman's task, and I appreciate all the effort you make to  
19 keep the trial moving and to treat each other with  
20 professionalism and respect and the witnesses.

21 If there's nothing else, we're off the record  
22 for the evening. I'll see you tomorrow morning.

23 (Whereupon, at 4:39 p.m., the hearing was  
24 adjourned, to be reconvened at 9:00 a.m., on Thursday,  
25 September 20, 2018.)

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C O N T E N T S

VOIR

WITNESSES: DIRECT CROSS REDIRECT RECROSS DIRE

W.C. BAKEWELL

by Ms. Ondrick 638 703

by Mr. Ganguly 680

by Judge Cheney 697

RUNE FISHER

by Mr. Shaw 709

by Mr. Jacobs 725

CHRISTOFFER MELCHIOR

by Mr. Shaw 759 813

by Ms. Ondrick 780

KRISTIAN HANSEN

by Mr. Liu 815 832

by Mr. Consilvio 824

ALAN HYLDAL

by Mr. Patnaik 834 904

by Mr. Jacobs 878

-- continued --

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E X H I B I T S

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TITLE: In The Matter Of: Certain Color Intraoral Scanners  
and Related Hardware and Software

INVESTIGATION NO: 337-TA-1091

HEARING DATE: 9-19-18

LOCATION: Washington, DC

NATURE OF HEARING: Hearing

I hereby certify that the foregoing/attached transcript is a true, correct and complete record of the above-referenced proceeding(s) of the U.S. International Trade Commission.

DATE: 9-19-18

SIGNED: 

Signature of the Contractor or the  
Authorized Contractor's Representative

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Signature of Court Reporter



